122—214

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~390.~~ 133

JAMES A. WISNER, PLAINTIFF IN ERROR,

vs.

WILLIAM N. BROWN AND WILLIAM McPHERSON, JUNIOR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED OCTOBER 11, 1883.

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1 STATE OF MICHIGAN, *County of Isabella:*

The Circuit Court for the County of Isabella.

James A. Wisner, plaintiff herein, by H. H. Hoyt, his attorney, comes and files this his declaration as commencement of suit, and complains of William N. Brown and William McPherson, Jr., defendants herein, in a plea of ejectment, filing his declaration, entering rule to plead, &c., as commencement of suit. For that whereas the said plaintiff, on the first day of June, in the year one thousand eight hundred and eighty-one, was possessed of the following real estate and premises, situate in the county of Isabella, in said State of Michigan, and being known and designated as the east half of the northeast quarter and southwest quarter of northeast quarter, section thirty-two (32), township sixteen (16) north, of range four (4) west, which said premises the plaintiff claims in fee; and he, the said plaintiff, being so possessed thereof, the said defendants afterwards, to wit, on the first day of June, in said last-mentioned year, entered into said premises and unlawfully withholds from said plaintiff the possession thereof, to the damage of said plaintiff one hundred dollars, and therefore he brings suit, &c.

H. H. HOYT,
Attorney for Plaintiff.

2 STATE OF MICHIGAN:

The Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

On filing a declaration in this cause, pursuant to the statute authorizing the commencement of suit by declaration, and on motion of H. H. Hoyt, attorney for the plaintiff, it is ordered that the defendants in said cause appear and plead to the said declaration within twenty days after the service upon them of a copy thereof, together with a notice of this rule or judgment, &c.

H. H. HOYT,
Plaintiff's Attorney.

STATE OF MICHIGAN, } *ss:*
County of Isabella, }

The Circuit Court for the County of Isabella.

WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.,
ads.
JAMES A. WISNER.

And the said William McPherson, Jr., one of the above-named defendants, by Brown & Leaton, his attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

Yours, &c., BROWN & LEATON,
Attorneys for Defendant McPherson, Jr.

3 SIR: Please take notice that on the trial of this cause the above-named defendant will give in evidence, under the general issue above pleaded, and insist in his defense that the statute of limitations of rights of action of the State of Michigan bars plaintiff's right of recovery in above action; also, by the bankrupt act laws of the United States said plaintiff has no right of action against defendant, the same being barred by the provisions of said statute limiting the time within which the assignee in bankruptcy, through whom plaintiff claims title, failed to proceed, as required by said law; also, said defendant will demand a separate trial of his right separate and apart from the other defendants in this cause.

Yours, &c., BROWN & LEATON,
Attorneys for Defendant McPherson.

4 STATE OF MICHIGAN, } *ss:*
County of Isabella, }

The Circuit Court for the County of Isabella.

WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.,
ads.
JAMES A. WISNER.

And the said William N. Brown, one of the above-named defendants, by John C. Leaton, his attorney, comes and demands a trial of the matters set forth in the plaintiff's declaration.

JOHN C. LEATON,
Attorney for Defendant Wm. N. Brown.

SIR: Please take notice that on the trial of this cause the above-named defendant will give in evidence, under the general issue above pleaded, and insist in his defense that the statute of limitations of rights of action of the State of Michigan bars plaintiff's right of recovery in above action; also, by the bankruptcy act laws of the United States said plaintiff has no right of action against defendant, the same being barred by the provisions of said statute limiting the time within which the assignee in bankruptcy shall proceed, as therein required; that the assignee in bankruptcy, through whom plaintiff claims title, failed to proceed as required by said law; also, said defendant will demand a separate trial of his rights separate and apart from the other defendants in said cause.

Yours, &c., JOHN C. LEATON,
Attorney for Def't Wm. N. Brown.

To H. H. Hoyt, att'y for def't.

Dated Dec. 9. 1881.

5 At a general term of the circuit court for the county of Isabella, State of Michigan, continued and held at the courthouse in the village of Mt. Pleasant, in said county, on Wednesday, the 19th day of April, 1882.

Present: Hon. Henry Hart, circuit judge.

Court opened in due form.

Ejectment.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

This cause having been duly noticed and placed upon the calendar for trial at the present term of this court, now comes the said plaintiff freely into court, by H. H. Hoyt, his attorney, and voluntarily submits to become nonsuit, nor does he further prosecute his suit against the said defendants, but with leave to move to set this nonsuit aside on or before the first day of next term of this court.

6 In the Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM MCPHERSON, Jr.

And now comes the said plaintiff, by H. H. Hoyt, his attorney, and move the court to set aside the nonsuit heretofore entered in this cause for the following reasons:

That said plaintiff submitted to a nonsuit in order to save the time and expense of a trial, as the same questions that were involved in this case were raised in the case of Wisner *vs* Wirth at that time for hearing in the supreme court, where it was supposed the questions raised in this case would be decided; that in the decision of the supreme court in that case the merits of the controversy were not determined, and it therefore becomes necessary to try the issue raised in this case.

Said motion will be founded on the record and files of this case and on the affidavit of H. H. Hoyt, filed therein.

Yours, &c., H. H. HOYT,
Plaintiff's Attorney.

To Brown & Leaton, def't's att'ys.

(Endorsed:) Filed May 26, 1882. L. C. Griffith, cl'k.

7 In the Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

STATE OF MICHIGAN, }
County of Saginaw, } *ss:*

Herbert H. Hoyt, of the city of East Saginaw, county and State aforesaid, being duly sworn, deposes and says that he is the attorney for the above-named plaintiff, and as such had entire charge of the above-entitled cause; that said cause was noticed for trial for the last term of this court, and this deponent, in behalf of the plaintiff, submitted to a nonsuit, with leave to move this court to set the same aside; that said suit involves the title to certain real estate, the *the* title of which in the plaintiff is based on certain bankruptcy proceed-

ings; that a case involving the same question—that of Wisner *vs.* Wirth—had been tried and disposed of, and was at this time in the supreme court, and on the calendar of said court, for hearing
8 at the April term of said court; that a like case, that of Wisner *vs.* Herring, had been tried and disposed of at the April term of this court; deponent believing that on the trial of this cause a useless expenditure of time and money would be had, as the validity of plaintiff's title through such bankruptcy proceedings would be determined in the supreme court in the diposal of the case of Wisner *vs.* Wirth.

That the decision of this court in this case was affirmed, but on the ground simply of a want of proper showing of the title to this property being in the assignee. Deponent gives these reasons for submitting to a nonsuit, and makes this affidavit as a basis of a motion to this court to set aside the same; and further deponent saith not.

HERBERT H. HOYT.

Sworn & subscribed to before me this 25 day of May, A. D. 1882.

STEPHEN V. HASKELL,
Notary Public, Saginaw County, M'ch.

(Endorsed): Filed May 26, 1882. L. C. Griffith, clerk.

9 At an adjourned term of the circuit court for the county of Isabella, State of Michigan, continued and held at the courthouse, in the village of Mt. Pleasant, on Friday, July 7th, 1882.

Present: Hon. Henry Hart, circuit judge.

Court opened in due form.

Ejectment.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

Motion having been duly entered to set the voluntary nonsuit aside heretofore submitted to the court in this cause, and, after hearing H. H. Hoyt in support of said motion, and Brown and Leaton in opposition thereto, it is ordered that the said nonsuit be, and the same hereby is, set aside upon the condition that the plaintiff pay the said defendants their costs, together with an attorney fee of five dollars.

10 The Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM MCPHERSON, Jr.

The plaintiff files this objection to the taxation of the costs by the defendant in the above-entitled cause, to wit, that no costs *was* allowed defendant when nonsuit was set aside, and plaintiff is not legally chargeable with any in this cause. Plaintiff claims an

appeal from the decision of the clerk if any costs in this case *is* taxed against plaintiff.

H. H. HOYT,
Plaintiff's Attorney.

To L. C. Griffith, clerk of circuit court.

(Endorsed:) Filed Nov. 22, 1882. L. C. Griffith, clerk.

11 *Taxed Bill of Costs.*

In the Circuit Court, County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN [and] WILLIAM MCPHERSON, Jr., Defendants.

Attorney fee, setting aside nonsuit	$5 00
" " after.	
" " trial.	
Term fee on continuances.	
County fee, $——; jury fee, $——.	
Reporter's fee—one half.	
Clerk's fee.	
Judgment taken by default—on cognovit, $15.	
Fee on certiorari on ——— of the judgment below.	
Fee awarded by the court on certiorrai, judgment before reversed in part.	
Fee awarded by the court on hearing on appeal.	
Sheriff's fee on service of writ or narr.	
Commissioner's fee on holding to bail.	
Cost of taking deposition.	
Cost of certified copy and exemplifications.	
Issue roll, ———, folios at 10 cents per folio.	
Witness fees on trial, viz:	
Days and miles traveled.	
Total witnesses' fees.	
Sheriff's fee on service of subpœna.	
Affidavit to fee bill	25
Taxation of costs	25
	$5 50

STATE OF MICHIGAN, } ss:
County of Isabella, }

William N. Brown, being duly sworn, says that the foregoing items of costs charged as disbursements have actually been paid, or the liabilities therefor incurred, and were necessary and are reasonable in amount; that the witnesses above named were in good faith made to attend, and were deemed material and necessary, and they respectively traveled the number of miles and actually attended the number of days specified, and that the copies and exemplifications

charged for were actually and necessarily used, or necessarily and in good faith obtained for use, and that the above att'y fee was allowed by an order of the court, dated July 17, 1882.

WILLIAM N. BROWN.

Sworn to and subscribed before me this 17 day of November, A. D. 1882.

L. C. GRIFFITH,
Notary Public, Isabella Co., Mich.

12 To H. H. Hoyt, Esq., att'y for plaintiff:

Take notice, the foregoing is a true and correct copy of defendants' bill of costs in this cause and of the affidavit of disbursements required by rule. Application will be made to the clerk of said court at his office on the 23 day of November, A. D. 188–, at nine o'clock a. m., to tax the same.

Dated November 17, A. D. 1882.

Yours, &c., BROWN & LEATON,
Att'ys for Defendants.

STATE OF MICHIGAN, } ss:
County of Isabella, }

William N. Brown. being duly sworn, says that on the 17th day of November, A. D. 1882, at eleven o'clock a. m., he served a true copy of the above bill of costs, with the affidavit and notice of application for taxation, upon H. H. Hoyt, attorney for plaintiff, by depositing the same in the post office in Mt. Pleasant, Michigan, sealed in an envelope, postage prepaid, addressed to H. H. Hoyt, Esq., East Saginaw, Michigan, that being the place where said att'y for plaintiff resides.

WILLIAM N. BROWN.

Sworn and subscribed before me this 17 day of November, A. D. 1882.

L. C. GRIFFITH,
Notary Public, Isabella Co., Mich.

—— consent to the taxation of the within bill of costs at the sum of —— dollars and —— cents on condition, however, that ——.

Dated this — day of ——, A. D. 188–.

——— ———,
Attorney for ——.

[Endorsed:] No. —. The circuit court, county of Isabella. James A. Wisner *vs.* Wm. N. Brown & Wm. McPherson, Jr. Taxed bill of costs for defendants. I do hereby tax the costs of plaintiff in the sum of five ($5) dollars and fifty cents. L. C. Griffith, clerk. Dated November 23, A. D. 1883. *Præcipe* for *fi. fa.* Let a writ of *fi. fa.* issue in this case. To sheriff of —— county. Yours, &c., ——— ———, att'y for ——. Filed Nov. 23, 1882. L. C. Griffith, cl'k.

13 In the Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM MCPHERSON, Jr.

To the clerk of the court:

Please to take notice that I claim and do hereby appeal to the circuit judge from your taxation of costs in the above-entitled cause.

Dated Nov. 27, 1882.

H. H. HOYT,
Plaintiff's Att'y.

(Endorsed:) Filed Nov. 27, 1882. L. C. Griffith, cl'k.

Ejectment.

14 At a general term of the circuit court for the county of Isabella, State of Michigan, commenced and held at the court-house in the village of Mt. Pleasant, in said county, on Monday, the 11th day of December, 1882.

Present: Hon. Henry Hart, circuit judge.

Court opened in due form.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

In this cause, the parties being in court by their respective attorneys ready for trial, thereupon came a jury, to wit: John Wilcox, George W. Snyder, Alexander Burke, John H. Hilliker, Ira Higbie, J. H. Jordon, Lawson Wing, Mathias Doll, Jerome H. Dunstan, O. F. Reynolds, George Sepoy, and Jacob Struble, good and lawful men, who, being duly chosen, tried, and sworn well and truly to try the issue between the parties, after hearing the proofs and allegations of the parties, the argument of counsel, and charge of the court, and by direction of the court, without retiring from
15 their seats, say upon their oaths that the said William N. Brown and William McPherson, Jr., are not guilty of unlawfully withholding from the said James A. Wisner the premises described in manner and form as the said James A. Wisner has in his declaration in this cause alleged; therefore, on motion of William N. Brown, attorney for the said William N. Brown and William McPherson, Jr., it is ordered and adjudged by the court now here that the said James A. Wisner take nothing by his suit, and that the said William N. Brown and William McPherson, Jr., do go therefore without day; and it is further ordered and adjudged by the said court that the said William N. Brown and William McPherson, Jr., do recover against the said James A. Wisner and Herbert H. Hoyt, his surety, for costs, his costs and charges by him about his defense in this behalf expended to be taxed, and that the said Wil-

liam N. Brown and William A. McPherson, Jr., have execution therefor.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

In this cause, on motion of H. H. Hoyt, attorney for plaintiff, and by consent of William N. Brown, attorney for defendants, in open court, it is hereby ordered that all proceedings in this cause be stayed until the first day of next term to settle bill of exceptions or move for a new trial.

Read, approved, and signed in open court.

HENRY HART,
Circuit Judge.

16 In the Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM MCPHERSON, Jr.

Please take notice that the bill of exceptions made in the above-entitled cause, of which the within is a copy, will be settled before Hon. Henry Hart, circuit judge, on the 14th day of February, A. D. 1883, at the court-house in Midland, at 9 o'clock in the forenoon of that day.

January 27, 1883.

H. H. HOYT,
Pl'ff's Att'y.

To Brown & Leaton, def'ts' att'ys.

STATE OF MICHIGAN, } ss:
County of Isabella, }

H. H. Hoyt, being duly sworn, deposes and says that he did on the 27th day of January, A. D. 1883, serve a notice, of which the above is a copy, together with a copy of the annexed proposed bill of exceptions in the above-entitled cause, upon Brown &
17 Leaton, attorneys for the defendants, by depositing said notice, with a copy of the proposed bill of exceptions, in the post office at East Saginaw, Mich., postage prepaid, and addressed to Brown & Leaton, attorneys, Mt. Pleasant, Michigan, on the 27th day of January aforesaid. Said paper was enclosed in an envelope addressed as aforesaid, at which place said attorneys did then, and do now, reside; & further deponent saith not.

H. H. HOYT.

Subscribed & sworn to before me this 13th day of Feb., 1883.

STEPHEN V. HASKELL,
Notary Public, Saginaw County, Michigan.

(Endorsed :) Filed Feb'y 17, 1883. L. C. Griffith, clerk.

18 *Bill of Exceptions.*

The Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

At the session of the circuit court held at the court-house on the 11th day of December, A. D. 1882, before the Hon. Henry Hart, circuit judge, the issue joined between the parties in this cause came on to be tried by a jury of said county of Isabella, for that purpose duly impanneled, good and lawful men of said county, at which day came there as well the said plaintiff and the said defendants, by their respective attorneys, and the jurors aforesaid impanneled to try the issue also came, and were then and there duly chosen and sworn to try the issue aforesaid between the parties aforesaid, and upon the trial of said issue the counsel for the plaintiff, to maintain and prove the issue on his part, produced and offered in evidence certified copies of the United States register and receiver's receipt, dated August 1, 1863, which showed an application and purchase by Lorenzo B. Curtis of the east half of northeast quarter and southwest quarter of northeast quarter, section 32, town 16 north, range
19 4 west, and in connection therewith plaintiff offered in evidence the patent for this land, dated February 10, 1864, conveying the land in controversy to Lorenzo B. Curtis.

The counsel for plaintiff, further to prove and maintain the issue on his part, produced and offered in evidence a deed dated Sept. 16, 1863, from Lorenzo B. Curtis and wife to Timothy Jerome and Alfred Willey, conveying the land in controversy.

The plaintiff, to further maintain and prove the issue on his part, produced and offered in evidence a deed, dated Nov. 15, 1865, from Timothy Jerome to Alfred Willey, of the lands in controversy in this case.

The counsel for plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a certified copy of the original petition in bankruptcy filed by Alfred Willey in the district court of the United States for the eastern district of Michigan, with the schedule thereunto annexed, filed with the clerk of said court on the 19th day of September, 1871, which petition is as follows:

To the Hon. John W. Longyear, judge of the district court of the United States for the eastern district of Michigan:

The petition of Alfred Willey, of the city and county of Saginaw, and State of Michigan, and district aforesaid, respectfully rep-
20 resents that he has resided for more than five years next immediately preceding the filing of this petition at said Saginaw city, within said judicial district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors and desires to obtain the benefit of the act entitled "An act to establish a uniform system of bank-

liam N. Brown and William A. McPherson, Jr., have execution therefor.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

In this cause, on motion of H. H. Hoyt, attorney for plaintiff, and by consent of William N. Brown, attorney for defendants, in open court, it is hereby ordered that all proceedings in this cause be stayed until the first day of next term to settle bill of exceptions or move for a new trial.

Read, approved, and signed in open court.

HENRY HART,
Circuit Judge.

16 In the Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM MCPHERSON, Jr.

Please take notice that the bill of exceptions made in the above-entitled cause, of which the within is a copy, will be settled before Hon. Henry Hart, circuit judge, on the 14th day of February, A. D. 1883, at the court-house in Midland, at 9 o'clock in the forenoon of that day.

January 27, 1883.

H. H. HOYT,
Pl'ff's Att'y.

To Brown & Leaton, def'ts' att'ys.

STATE OF MICHIGAN, }
County of Isabella, } *ss:*

H. H. Hoyt, being duly sworn, deposes and says that he did on the 27th day of January, A. D. 1883, serve a notice, of which the above is a copy, together with a copy of the annexed proposed bill of exceptions in the above-entitled cause, upon Brown &
17 Leaton, attorneys for the defendants, by depositing said notice, with a copy of the proposed bill of exceptions, in the post office at East Saginaw, Mich., postage prepaid, and addressed to Brown & Leaton, attorneys, Mt. Pleasant, Michigan, on the 27th day of January aforesaid. Said paper was enclosed in an envelope addressed as aforesaid, at which place said attorneys did then, and do now, reside; & further deponent saith not.

H. H. HOYT.

Subscribed & sworn to before me this 13th day of Feb., 1883.
STEPHEN V. HASKELL,
Notary Public, Saginaw County, Michigan.

(Endorsed :) Filed Feb'y 17, 1883. L. C. Griffith, clerk.

18 *Bill of Exceptions.*

The Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

At the session of the circuit court held at the court-house on the 11th day of December, A. D. 1882, before the Hon. Henry Hart, circuit judge, the issue joined between the parties in this cause came on to be tried by a jury of said county of Isabella, for that purpose duly impanneled, good and lawful men of said county, at which day came there as well the said plaintiff and the said defendants, by their respective attorneys, and the jurors aforesaid impanneled to try the issue also came, and were then and there duly chosen and sworn to try the issue aforesaid between the parties aforesaid, and upon the trial of said issue the counsel for the plaintiff, to maintain and prove the issue on his part, produced and offered in evidence certified copies of the United States register and receiver's receipt, dated August 1, 1863, which showed an application and purchase by Lorenzo B. Curtis of the east half of northeast quarter and southwest quarter of northeast quarter, section 32, town 16 north, range
19 4 west, and in connection therewith plaintiff offered in evidence the patent for this land, dated February 10, 1864, conveying the land in controversy to Lorenzo B. Curtis.

The counsel for plaintiff, further to prove and maintain the issue on his part, produced and offered in evidence a deed dated Sept. 16, 1863, from Lorenzo B. Curtis and wife to Timothy Jerome and Alfred Willey, conveying the land in controversy.

The plaintiff, to further maintain and prove the issue on his part, produced and offered in evidence a deed, dated Nov. 15, 1865, from Timothy Jerome to Alfred Willey, of the lands in controversy in this case.

The counsel for plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a certified copy of the original petition in bankruptcy filed by Alfred Willey in the district court of the United States for the eastern district of Michigan, with the schedule thereunto annexed, filed with the clerk of said court on the 19th day of September, 1871, which petition is as follows:

To the Hon. John W. Longyear, judge of the district court of the United States for the eastern district of Michigan:

The petition of Alfred Willey, of the city and county of Saginaw, and State of Michigan, and district aforesaid, respectfully rep-
20 resents that he has resided for more than five years next immediately preceding the filing of this petition at said Saginaw city, within said judicial district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors and desires to obtain the benefit of the act entitled "An act to establish a uniform system of bank-

ruptcy throughout the United States," approved March 2, 1867; that the schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the provisions of said act, and that he may be decreed to have a certificate of discharge from all his debts provable under the same.

ALFRED WILLEY.
WM. H. SWEET,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
Eastern District of Michigan, } *ss:*

21 I, Alfred Willey, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information, and belief; and I do further make oath that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

ALFRED WILLEY.

Subscribed and sworn to before me this 14th day of September, A. D. 1871.

BENJ. J. BROWN,
Register in Bankruptcy.

That Schedule "B," annexed to said petition, contains a particular description of all the real estate owned by said petitioner at the date of filing said petition, and is in the words and figures following:

"South half of southeast quarter of section 26, and northwest quarter of northeast quarter of section 35, town 15 north, range 5 west, Isabella county, Mich., 120 acres; west half of northwest quarter, east half of northeast quarter, and southwest quarter of northeast quarter of section 32; the southeast quarter of southeast quarter of section 30, town 16 north, range 4 west, Isaballa county, Michigan, 240 acres; no incumbrance; title perfect; north half of northeast quarter, northeast quarter of northwest quarter, and north half of southeast quarter, section 7, town 17 north, range 6 west, Isabella county, Mich.; southwest quarter of southeast
22 quarter, southeast quarter of southwest quarter, and east half of southeast quarter of section 1, west half of northwest ¼ of section 15, and south half of southwest quarter of section 22,

town 17 north, range 7 west, Osceola county, Michigan, 520 acres, encumbered by mortgage executed by petitioner and wife May 16, 1868, to Franklin P. Sears, of East Saginaw, Michigan; amount unpaid and due at this date for principal and interest, as near as petitioner can estimate the same, is the sum of $4,170."

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence certified
22¼ copies of the original papers on file in said district court in the matter of Alfred Willey, bankrupt, as follows:

1st. Order of the register in bankruptcy of said court adjudicating said Alfred Willey a bankrupt on the petition aforesaid. Date of said order, Jan'y 31, 1872. 2nd. Order of said register dated Feb'y 15, 1873 (there being no opposing interest), appointing William Gillett assignee of the estate of said bankrupt. 3d. Acceptance of William Gillett, dated February 13, 1873, of said appointment of assignee of the estate of Alfred Willey, the bankrupt aforesaid. 4th. Bond of said assignee, William Gillett, dated February 20, 1873, given as required by law in such cases, and the approval by said court. Said papers were filed by the register of bankruptcy of said court with the clerk of the district court of the United States for the eastern district of Michigan April 2, 1880.

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a certified copy of the original assignment in bankruptcy of all the estate,
22½ real and personal, of Alfred Willey aforesaid, made by B. J. Brown, register in bankruptcy, said assignment dated the 21st day of February, A. D. 1873, to Wm. Gillett, assignee of said bankrupt.

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a certified copy of the original petition made by William Gillett, assignee, dated April 2, 1880, and presented to the district court of the United States for the eastern district of Michigan for the purpose of obtaining an order from said court authorizing the sale of the interest of the bankrupt in the lands in controversy in this case. Said petition is as follows:

In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILLEY, Bankrupt.

To the Hon. Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan:

The petition of William Gillette, of the city of East Saginaw,
23 in the State of Michigan and district aforesaid, respectfully represents that he was duly appointed by the court assignee of the estate of Alfred Willey, the above-named bankrupt; that no property, money, or effects has come into his hands as such assignee of such estate, except as is hereinafter stated, from the schedule of said bankrupt. It appears that the said bankrupt, at the time of the

filing of his petition, claimed an interest in the following real estate, to wit: South half of southeast quarter section 26, northwest quarter of northeast quarter section 35, in township 15 north, of range 5 west; also west half of northwest quarter southwest quarter of northeast ¼, east half of northeast quarter section 32, east half of southeast quarter section 19, and southeast quarter of southeast quarter section 30, in township 16 north, of range 4 west, said land being in Isabella county, State of Michigan.

Your petitioner having no funds belonging to said estate in his hands did not investigate the title of said bankrupt to said land, and, believing that said lands were of little value, paid no attention to them until recently, when application was made to your petitioner to purchase the right of said bankrupt in said lands. From examination of the records it appears that the lands have been sold for taxes to private parties for a number of years, beginning in 1867; that the right acquired by virtue of the sale of said lands for delinquent taxes is held by one party. In addition to such title
24 has been obtained a deed from the bankrupt of said lands; that another party has, by virtue of a sale on execution, based upon a judgment obtained against said bankrupt before he was adjudicated a bankrupt, acquired a title to said lands; that the title to said lands is complicated in this manner, both parties claiming to own said lands by virtue of the title they have acquired thereto in the manner above stated; that, from inquiry and examination, your petitioner believes that the title which may be vested in him as assignee of said bankrupt is of but little value without a lengthy litigation, and your petitioner has no funds in his hands to carry on such litigation or pay taxes that may be assessed thereon; that from information your petitioner sets forth that said lands were located for the pine timber that originally was on the land, which having been removed the lands were not considered by the bankrupt of sufficient value to pay taxes thereon; that petitioner is offered one hundred dollars for the conveyance of the title which he holds as assignee of the said bankrupt to said lands, and upon information and belief your petitioner affirms that said sum is all the interest of said estate in said lands is worth, and that the acceptance of said offer and the conveyance of said title to said lands accordingly would be for the interest of the creditors of the estate of said bankrupt.

And your petitioner prays that an order may be made in this case authorizing your petitioner to sell said lands at private sale
25 as he may deem advisable, but not at a less sum than one hundred dollars.

And your petitioner further represents that from said schedule it appears that said bankrupt claimed at the date of filing his petition in bankruptcy an interest in the following lands, to wit: North half of northeast quarter, northeast quarter of northwest quarter, north half of southeast quarter section 17, township 18 north, of range six west; also southwest quarter of northeast quarter, southeast quarter of southwest quarter, and east half of southeast quarter sec. 1, west half of northwest quarter section 15, south half of southwest

quarter section 22, township 17 north, of range seven west, which property was encumbered at the date of the bankrupt's petition by mortgage executed by the bankrupt and his wife to Franklin P. Sears, of East Saginaw, Michigan. The amount due on the mortgage at the date of the filing of said petition was five thousand two hundred dollars. Said mortgage was dated May 16, 1868; that said mortgage has been foreclosed and the property described in said mortgage sold for the benefit of the mortgagee; that any right said bankrupt may have had in said mortgaged land at the time of the filing of his said petition in bankruptcy appears to have been taken from the estate by virtue of said foreclosure; that petitioner has as yet been unable to dispose of the title of said bankrupt in said land, and has had no offer for the same; but as these lands are all
26 the property that has come into the hands of your petitioner, — asks that he may have a like order for the sale of the lands above described, at a private sale, for the best price he can obtain.

Wherefore he prays that he may be authorized to make sale of said property in said manner.

WILLIAM GILLETTE, *Assignee, &c.*

EASTERN DISTRICT OF MICHIGAN, } *ss.*
County of Saginaw, }

On this 2d day of April, A. D. 1880, personally appeared the above-named William Gillette, who, being duly sworn, says he has read the foregoing petition by him subscribed, and knows the contents thereof, and that the same are true as therein set forth.

THOS. M. JAMES,
Register in Bankruptcy.

Filed April 3, 1880, at 9 a. m.

27 The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a certified copy of the original order of said court authorizing the assignee to sell said lands, which is as follows:

In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILLEY, a Bankrupt. At Detroit, April 5, A. D. 1880. Eastern District of Michigan.

On reading and filing the petition of William Gillette, assignee of the estate of the above-named bankrupt, it is ordered by the
28 court that the said William Gillette, assignee of the estate of the above-named bankrupt, be, and he is hereby, authorized and directed to sell at private sale for the sum of one hundred dollars the following-described real estate, to wit:

South half of southeast quarter section 26, northwest quarter of northeast quarter section 35, in township 15 north, of range 5 west; also west half of northwest quarter, southwest quarter of northeast quarter, east half of northeast quarter section 32, east half of southeast quarter section 19, and southeast quarter of southeast quarter

section 30, in township 16 north, of range 4 west, said land being in Isabella county, State of Michigan, and execute and deliver a proper deed for the same to the purchaser.

And it is further ordered by the court that the said assignee be also authorized and directed to sell at private sale, as a whole or in parcels, as may be considered by him advisable, the following lands, for the best price or prices he may be able to obtain therefor, to wit: North half of northeast quarter, northwest quarter, north half of southeast quarter section 7, township 17 north, range 6 west; also southwest quarter of northeast quarter, southeast quarter of southwest quarter, and east half of southeast quarter section 1, west half of northwest quarter section 15, south half of southwest quarter section 21, township 17 north, of range 7 west.

Witness the Hon. Henry B. Brown, judge of said court, and the seal thereof, at Detroit, in said district, on the 5th day of April, A. D. 1880.

[SEAL OF COURT.]

D. J. DAVIDSON,
Clerk of Said Court,
By JNO. GRAVES,
Deputy Clerk.

29 The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a deed dated April 13, 1880, made by William Gillette, assignee in bankruptcy of Alfred Willey, bankrupt, to the plaintiff in this cause, conveying the land in controversy, said deed having been made in pursuance of the above order.

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered evidence tending to show that defendants claimed, at the commencement of this suit, an interest in the land in controversy and then rested his case.

The defendants, to maintain and prove the issue on their part, produced and offered in evidence a deed from the auditor general of the State of Michigan to Isaac W. Bush, bearing date Dec. 18, 1868, recorded in liber 4 of deeds, of Isabella county, on page 152, being for sale of this land for delinquent taxes for 1867. Said deed conveys the land in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a deed from auditor general to Isaac W. Bush, dated Dec. 18, 1868, recorded Jan.
30 19, 1869, in liber 4 of deeds, p. 156, for delinquent taxes of 1866, conveying the land in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a deed from Isaac W. Bush to William McPherson, Jr., defendant, dated March 7, 1870, recorded Sept. 29, 1870, in liber 6 of deeds, p. 182, conveying the land in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence eight separate deeds from the auditor general to William McPherson, Jr., for the sale of the land in controversy for the delinquent taxes for the years 1868, 1869,

1870, 1872, 1873, 1874, 1875, [and] 1876, said deeds being duly recorded in said county.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a quit-claim deed dated Sept. 11, 1875, recorded Sept. 11, 1875, in liber 15 of deeds, p. 303, from Alfred Willey to William N. Brown—consideration $250—conveying the land in controversy and other lands.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a quit-claim deed dated Oct. 19, 1875, recorded Dec. 4, 1875, in liber 15 of deeds, p. 549, from Anna M. Willey to William N. Brown, conveying the land
31 in controversy.

The defendants, to further maintain and prove the issue on their part, produced and offered in evidence a deed dated Nov. 6, 1875, recorded Dec. 6, 1875, in liber 15 of deeds, p. 553, from William N. Brown to William McPherson, Jr., said deed conveying an undivided one-half interest in the lands in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a deed dated Dec. 4, 1875, recorded Dec. 8, 1875, liber 16 of deeds, p. 588, from William McPherson, Jr., to William N. Brown. Said deed conveyed an equal undivided one-half interest in the land in controversy.

The counsel for the defendants, further to maintain and prove the issue on their part, called William N. Brown, who, being duly sworn, testified as follows:

I am the man who bought the land from Willey that is shown by a deed in evidence in this case, I can't exactly fix the date when I first had notice of the proceeding in bankruptcy in the United States court against Alfred Willey. It was some time after the deed from the assignee to the plaintiff was placed on record. I think the first knowledge I had was from the plaintiff himself. That is the first intimation I had of the existence of any such proceedings or any proceedings in the bankrupt court with Alfred
32 Willey, bankrupt. I had no notice of any application to the district court to sell the land in controversy on the part of the assignee. I never heard of it until after the matter was put on record here, and I think the plaintiff himself came to me and claimed title to the property. It was after the deed was put on record here.

It is admitted between the counsel for the respective parties that the only assignment by the court or register in bankruptcy that was ever recorded in Isabella county was recorded on the 19th day of April, 1880, a copy of which has been introduced in evidence in this case.

The defendants here rested their case.

By the COURT: As the case now stands, irrespective of the
33 validity of these tax titles, I shall charge the jury that the plaintiff cannot recover.

The counsel for the plaintiff then made the following offer:

I now offer to show to the court that the taxes for the several years for which deeds have been offered in evidence by the defendants in this case are void, on account of a want of a proper certificate of the supervisor on the original assessment roll of the township where the land in controversy is situated; that in each of these years the supervisor had omitted from his certificate these words, that he had assessed the lands in his township at their "true cash value, and not at the price it would sell for at a forced or auction sale," and by reason of said omission the taxes were illegal and said deeds offered in evidence were void.

But the circuit judge did then then and there declare and deliver his opinion that as he had decided to charge the jury that the plaintiff had shown no title to the land in controversy, and that defendants were entitled to a verdict, it was immaterial whether the tax titles offered by defendants were valid or not, and then and there refused to receive such evidence or to allow plaintiff to show that the tax title for any or all of said years were invalid; to which opinion and decision of the said circuit judge, and to his refusal to admit such evidence, the said counsel for the plaintiff did then and
34 there except.

The counsel for plaintiff then requested the court to charge the jury as follows:

1. The title of this land was vested in the assignee, and the assignee took such proceedings as the law requires in such cases to convey the title to the plaintiff, and the plaintiff had all the title that Willey had at the time of the adjudication in bankruptcy to the said lands, and the evidence in this case shows that the plaintiff's title was valid.

2. That in this case the plaintiff has shown through mesne conveyances from the Government a title in himself, and has made out a *prima facie* case entitling him to recover.

Which said requests to charge so made by the counsel for the plaintiff as aforesaid were by said circuit judge refused. Thereupon the counsel for said plaintiff did then and there, on behalf of the said plaintiff, except to the opinion of said circuit judge and his refusal to charge as requested.

And the said circuit judge did then and there declare and deliver his opinion to said jury as follows:

GENTLEMEN OF THE JURY: In this case I do not think the plaintiff has by any testimony introduced in court established any title in himself to the land in controversy. I therefore charge you, as a matter of law, that the defendants are entitled to a verdict in this case.

35 The counsel for the plaintiff did then and there except to the opinion of the circuit judge which says: "In this case I do not think the plaintiff has by any testimony introduced in court established any title to the land in controversy," and directing a verdict for defendant.

And the jury, under the direction of the court, then and there gave their verdict that the said defendants did not unlawfully with-

hold from the plaintiff the possession of the east half of the northeast quarter and southwest quarter of northeast quarter of section 32, township 16 north, of range 4 west, being the premises described in the declaration in this cause.

And forasmuch as the said several matters so introduced and given in evidence on the part of the plaintiff and by his counsel aforesaid do not appear by the records of said trial and verdict, and because none of the exceptions so offered and made to the opinion and decision of said circuit judge do appear upon the records of said trial, the said counsel for the said plaintiff did then and there prepare the aforesaid exceptions to the opinion of the said circuit judge and request him to sign the bill of exceptions containing the several matters aforesaid, pursuant to the statute in such case made and provided, and thereupon the said circuit judge, at the request of the counsel for the plaintiff aforesaid, hath signed this bill of exceptions pursuant to the statute aforesaid on this 21st day of Frbruary, A. D. 1883.

HENRY HART,
Circuit Judge.

(Endorsed:) Filed Feb'y 27, 1883. L. C. Griffith, clerk.

36 STATE OF MICHIGAN, } ss:
County of Isabella, }

I, L. C. Griffith, clerk of the circuit court for the county of Isabella, do hereby certify that the above and foregoing is a true and correct copy of the files and journal entries in the case of James A. Wisner *vs.* William N. Brown & William McPherson, Jr., as appears of record and on file in my office; that I have compared the same with the original and it is a true transcript therefrom and the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Mt. Pleasant, this — day of March, A. D. 1883.

[Seal of Circuit Court.]

L. C. GRIFFITH,
Clerk of the Circuit Court.

37 *Writ of Error.*

The people of the State of Michigan to the judge of our circuit court in and for the county of Isabella, Greeting:

[Seal of Supreme Court.]

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our said circuit court before you, between James A. Wisner, plaintiff, and William N. Brown and William McPherson, Jr., defendants, in a plea of ejectment, manifest error hath intervened, to the great damage of the said plaintiff, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid *and* in this behalf, do command you that if judgment be thereupon given then you send

to our supreme court, distinctly and openly, under your seal, the record and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, so that our said court may have them at the supreme court room in the city of Lansing on the sixth day of March, next, that, the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of Michigan ought to be done.

Witness the Honorable Benjamin F. Graves, chief justice of our supreme court, at Lansing, this thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-three.

CHAS. C. HOPKINS,
Clerk of the Supreme Court.

38 To the supreme court of the State of Michigan:

The execution of the within writ appears by the transcript of record hereto annexed.

March 3d, 1883.

L. C. GRIFFITH,
Clerk of Circuit Court.

[Endorsed:] No. 6745. Supreme court of the State of Michigan. James A. Wisner, pl'ff & app'l't, *vs.* William N. Brown *et al.*, def'ts. Writ of error. Filed March 10, 1883. Chas. C. Hopkins, clerk. H. H. Hoyt, att'y for pl'ff & app'l't.

39 State of Michigan. In Supreme Court.

JAMES A. WISNER, Plaintiff & Appellant,
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr., Defendants.

SIR: Please take notice that the plaintiff in the above-entitled cause has caused to be issued out of and under the seal of the supreme court of the State of Michigan a writ of error in the above-entitled cause, dated February 13th, 1883, and returnable at the supreme court-room, in the city of Lansing, March, 6th, 1883.

Yours, &c.,
H. H. HOYT,
Attorney for Appellant.

Dated February 17th, 1883.

To Brown & Seaton, attorneys for defendants.

40 STATE OF MICHICAN, } *ss:*
County of Saginaw, }

H. H. Hoyt, being duly sworn, deposes and says that on February 17th, 1883, he served a notice, of which the within is a true copy, upon Brown & Leaton, attorneys for the defendants in the within-entitled cause, by enclosing the same in an envelope, postage prepaid, and addressed to Brown & Leaton, Mt. Pleasant, Mich, the place where said Brown & Leaton, who are attorneys for said defendants, did then & do now reside, and depositing the same in the post office at East Saginaw, Mich.

H. H. HOYT.

Subscribed and sworn to before me this 9th day of March, 1883.

STEPHEN V. HASKELL,
Notary Public, Saginaw County, Michigan.

[Endorsed:] No. 6745. State of Michigan. Supreme court. James A. Wisner, pl'ff & app'l't, *vs.* William N. Brown *et al.*, defendants. Proof of service of notice of the issuing of writ of error. Filed March 10, 1883. Chas. C. Hopkins, clerk. H. H. Hoyt, attorney for appellant.

41 *Assignment of Errors.*

State of Michigan. Supreme Court.

JAMES A. WISNER, Plaintiff and Appellant,
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr., Defendants.

And afterwards, to wit, on the 10th day of March, A. D. 1883, before the supreme court at Lansing, comes the plaintiff and appellant, by H. H. Hoyt, his attorney, and says that in the records and proceedings aforesaid, and in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. That the circuit judge erred in refusing to charge the jury as requested by the plaintiff in his request to charge as set forth in the bill of exceptions in this case.

2. That the circuit judge erred in his charge to the jury, as follows: "I do not think the plaintiff has, by any testimony introduced in court, established any title to the land in controversy," and directing a verdict for defendants.

3. That the circuit judge erred in not admitting evidence offered by the plaintiff for the purpose of invalidating the tax deeds offered by the defendants in this case.

And the plaintiff prays that the judgment below may be reversed, and that judgment may be entered in this court for plaintiff.

H. H. HOYT,
Attorney for Plaintiff and Appellant.

(Endorsed:) Filed March 12, 1883. Chas. C. Hopkins, clerk.

42 *Motion to Remand Bill of Exceptions.*

State of Michigan. Supreme Court.

JAMES A. WISNER, Plaintiff and Appellant,
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr., Defendants and Appellees.

To H. H. Hoyt, plaintiff's attorney:

Please take notice that we have caused a special motion to be entered in the special motion book, kept by the clerk of said court in the city of Lansing, asking that the court grant an order referring the bill of exceptions heretofore settled in the above-entitled cause

to the circuit court for the county of Isabella and State of Michigan, to amend, correct, and add further testimony to the said bill of exceptions filed in this cause and heretofore settled by said judge for the reasons set forth in said motion, and reasons therefor being hereto attached, together with the affidavits, a copy of the certificate made by the circuit judge settling said bill of exceptions; also
43 that said motion will be brought on for argument at the court-room of the supreme court, in the city of Lansing, on the 3rd day of April, A. D. 1883.

Dated March 23rd, 1883.

BROWN AND LEATON,
Attorneys for Def'ts & Appellees.

44 State of Michigan. Supreme Court.

JAMES A. WISNER, Plaintiff and Appellant,
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr., Defendants and Appellees.

And now come the said defendants, William N. Brown and William McPherson, Jr., and move the court now here to grant an order of said court that the bill of exceptions heretofore settled in the above cause be remanded and referred to the circuit judge of the 21st judicial circuit to amend and correct and add further testimony to said bill filed in this cause for the following reasons:

First. That the said bill of exceptions is incorrect and incomplete.

Second. That there was other and material testimony given on the trial of said cause that was material and necessary for these defendants, and that is necessary to have incorporated in said bill, in order that said defendants have a fair and proper hearing
45 in this court, and to the proper disposition of the case as set forth in the certificate of said circuit judge hereto attached and made a part of this motion, and on which said original bill of exceptions as settled the affidavits of William N. Brown, Peter F. Dodas, and John C. Leaton hereto attached and the said certificate of said judge this motion is founded.

BROWN AND LEATON,
Attorneys for Def'ts and Appellees.

46 In the Supreme Court for the State of Michigan.

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM MCPHERSON, Jr.

I, Henry Hart, judge of the 21st judicial circuit, do hereby certify:

1st. That I am the circuit judge before whom the above cause was tried and settled the bill of exceptions therein.

2nd. That the only evidence introduced by the plaintiff on the trial tending to show that any of the papers introduced on the trial

of said cause relating to the bankruptcy proceedings in the matter of Alfred Wiley, mentioned in the said bill of exceptions heretofore settled as aforesaid, were copies, or that there ever was any of such proceedings, or that there ever was any original petition in bankruptcy, adjudication in bankruptcy, appointment of assignee in bankruptcy, acceptance of such assignee, order for sale by assignee, assignment in bankruptcy, or petition of assignee for order of sale, was the certificates of the clerk of the district court of the United States for the eastern district of Michigan, and that such cer-
47 tificates should have been set forth in said bill of exceptions.

3rd. That on the trial of said cause it was admitted by the counsel for the plaintiff that neither of the defendants ever had any knowledge or notice of any of the said bankruptcy proceedings.

4th. That on the trial of said cause after the defendants had rested their case the counsel for the plaintiff addressed the court as follows: "If the court please I suggest that we present the case so far to the court, and, if the court thinks that the plaintiff has not made out a case, to charge the jury to that effect will save a good deal of time in invalidating these tax-titles. If the court thinks, on the contrary, that the plaintiff has made out a case we can go into the question of the validity of the tax-titles."

5th. That the defendants were not represented at the settling of the said bill of exceptions, and that by inadvertence the above omissions were occasioned, and I am of opinion that justice cannot be done to the defendants on the bill of exceptions as now settled.

Dated March 20th, 1883.

HENRY HART,
Circuit Judge.

48 Supreme Court, Isabella County.

STATE OF MICHIGAN, } ss:
County of Isabella, }

JAMES A. WISNER, Plaintiff & Appellant,
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Defendants & Appellees.

William N. Brown, being duly sworn, deposes and says that he is a member of the firm of Brown & Leaton, the attorneys for the defendants in the above-entitled cause, and also one of the defendants therein named, and has had full charge of said cause up to the time when the bill of exceptions was settled.

Deponant further says that the bill of exceptions and notice of settlement thereof was sent to deponant's residence at the time of its reception during the absence of this deponent; that as soon as deponent attention was called to the said bill of exceptions he at once began its examination, but, owing to the absence from the files of a copy of the testimony taken in said cause, *and that* a copy of the same could not be obtained in time to prepare amendments before the time fixed for settling said bill of exceptions.

Deponant further says that on the day said bill of exceptions was noticed to be settled he was unable to be present, but sent a telegram to Hon. Henry Hart, circuit judge, requesting him to withhold his signature from said bill of exceptions, and went immediately to Midland, where said judge resides, and was advised that the signature of said judge had been withheld and the settlement postponed for one week.

Deponant then informed said judge that he did not think it would be possible to get a copy of the reporter's notes and the exhibits so as to propose amendments to the bill of exceptions within the time specified, but he would do all in his power.

Deponant further says that within a day or two this deponant was obliged to go to Washington, D. C., on important business and left the settlement of said bill of exceptions in charge of John C. Leaton, the other member of the firm of Brown & Leaton, the attorneys for said defendants.

Deponant further says that on or about the 15th day of March, A. D. 1883, the amendments to said bill of exceptions had been completed, and deponent was informed by Dodds Brothers that they had received letters from H. H. Hoyt, the att'y for plaintiff and appellant, that he would consent to any amendments in accordance with the facts; that he went to East Saginaw, called on Mr. Hoyt, and submitted the proposed amendments to said bill, and was told by said Hoyt that he would neither stipulate nor consent to any amendments whatever. Further deponent says not.

WILLIAM N. BROWN.

Sworn to and subscribed before me this 23 day of March, A. D. 1883.

JAMES W. LONG,
Notary Public in and for Isabella Co., Mich.

In the Supreme Court.

STATE OF MICHIGAN, } ss:
Isabella Co., }

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM MCPHERSON, Jr.

John C. Leaton, being duly sworn, deposes and says that on or about the 20th day of February, 1883, he had an interview with Herbert H. Hoyt, the att'y for plaintiff in this suit, this deponent then and there acting as attorney for defendants; said Hoyt then and there represented that the bill of exceptions then in the hands of Hon. Henry Hart, & which said bill of exceptions, this deponent is informed and believes, has since been signed by the said Hart without amendment, was a true statement of the proceedings had on the trial of said cause in the circuit court before said Hart. He then and there further agreed that if defendants should find that the said bill of exceptions in any way differed from the proceedings

had on the trial of said suit said defendants should have the privilege of amending said bill of exceptions so as to correct the same.

52 It was further agreed that said Leaton, on his return to Mt. Pleasant, should look over the matter & propose amendments to said bill. This deponent did not get home until Wednesday evening, February 21, 1883; that on the 22nd of February deponent found that there was not in the files & records of said court sufficient data to settle the bill; that part of the *in* instruments of proceedings in the bankrupt court, which said Hoyt mentioned in his said bill of exceptions as having been introduced in evidence on the said trial, were not by him left in files of this court, but were retained by him.

Deponent further says that on Feb. 23, 1883, he not being able to attend to the settling of said bill personally, & said Brown being at the time in Washington, D. C., & having left with deponent *that* the charged of settling said bill, this deponent, on the said 23rd day of February, turned the matter over to Dodds Bros., with instructions to notify the said circuit judge & said Hoyt that as soon as the stenographer's minutes could be had to settle the bill, and that they should immediately procure said stenographer's minutes.

JOHN C. LEATON.

Sworn & subscribed before me March 23, 1883.

D. E. LYON,
Notary Public in & for Isabella Co., Mich.

53 State of Michigan Supreme Court.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM McPHERSON, Jr.

ISABELLA COUNTY, *ss:*

Peter F. Dodds, being duly sworn, deposes and says that he is a member of the law firm of Dodds Bros., of Mt. Pleasant, Michigan, and that on the 23rd day of February, 1883, said firm of Dodds Bros. were requested by John C. Leaton, a member of the law firm of Brown and Leaton, to procure minutes of the proceedings had on the trial of said cause from the stenographer for the purpose of proposing amendments to the bill of exceptions proposed in said cause for settlement, and to notify the circuit judge, one H. H. Hoyst, counsel for the plaintiff, of the same, and on the procuring of said testimony from said stenographer to propose the necessary amendments and proceed to settle said bill of exceptions, and that on said 23rd day of Feb'y, 1883, in accordance with said instructions, deponent wrote to said stenographer, requesting a copy of said minutes, and on the 7th day of March, 1883, received the same, and on the 15th day of March, 1883, had completed and proposed amendments to said bill of exceptions and gave the copy of said bill, with the proposed amendments, to defendant, William N. Brown.

And deponent further says that on the said 23rd day of
54 Feb'y he wrote to said Hoyt in the name of said Dodds Bros., and in answer thereto received a letter from said Hoyt, which is hereto attached, marked "A," and in answer to a second letter from said Dodds Bros., written by deponent, a second letter was received from said Hoyt, which is hereto attached and marked "B," and both of which letters are made a part of this affidavit, and further says not.

PETER F. DODDS.

Subscribed and sworn to before me this 23 day of March, 1883.

M. DEVEREAUX,
Notary Public in & for Isabella Co., Mich.

55 "B."

EAST SAGINAW, MICH., *Feb'y 27th*, 1883.

Messrs. Dodds Bros., att'ys, Mt. Pleasant, Mich.

GENTLEMEN: Yours of the 26th inst., having reference to the case of Wisner *vs.* Brown *et al.*, came to hand. In reply, would say that I shall not object to any amendment to the bill that is in accordance with the facts. What I did object to was the delay. I spoke to Lewis about getting the evidence on the trial before I prepared the bill. He was unable to get his minutes. I saw him yesterday. He had then received them, & said he would send you copy either to-day or to-morrow. I have no doubt you will find, upon examination of the testimony, that the bill fairly states the case. I never desire to go to the Supreme Court on a case not made at the trial.

I am yours truly, H. H. HOYT.

56 "A."

EAST SAGINAW, MICH., *February 24th*, 1883.

Dodd's Bros., attorneys, &c., Mt. Pleasant, Mich.

DEAR SIR-: Yours of the 23rd inst. came to hand at this moment. In reply would say that Messrs. Brown & Leaton had a copy of the bill of exceptions served on them on the 27th of last month. It would not have taken Mr. Brown two hours to have digested the bill and proposed such amendments as he saw fit. The time for settlement was the 13th of the month. At Mr. Brown's suggestion & request, he was given a week's further time. The understanding with Mr. Leaton was that he should have prepared such amendments to the bill as he desired & submit them to me, & the bill should
57 have been settled to-day. I understand Mr. Leaton — that he would inform the judge to that effect. He must have forgotten to do so, as the judge has signed the bill & sent it to me. I have retained the bill until now, in order if any amendments had been offered to-day they could have been incorporated. I shall send the bill to the clerk to-night. I am sorry Mr. Leaton is sick, but Mr. Brown has had sufficient time, & I knew that the bill contains the facts. I should have had Mr. Lewis' minutes, but he has not

been able to obtain them. I prefer to have the case in the next term of supreme court, & do not propose that the delay in procuring the stenographer's minutes shall prevent.

I am, yours truly, H. H. HOYT.

58 [Endorsed:] 6745. Supreme court. James A. Wisner *vs.* William N. Brown *et al.* Motion for an order to remand bill of exceptions to circuit judge for correction & amendment. Filed March 26, 1883. Chas. C. Hopkins, clerk. Brown & Leaton, def'ts' att'ys.

59 *Special Orders.*

At a session of the supreme court of the State of Michigan, held at the supreme court-room, in the city of Lansing, on the fourth day of April, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Benjamin F. Graves, chief justice; Thomas M. Cooley, James V. Campbell, associate justices.

JAMES A. WISNER, Plaintiff & Appellant,
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr., Defendants.

A motion having been made in this cause to remand the bill of exceptions filed therein for correction and amendment, and the same having been heard, by consent of counsel for appellant it is ordered that the motion be allowed and that the said bill of exceptions be remanded to the circuit court for the county of Isabella for such correction and amendment as the circuit judge may see fit to make, and that the cause go to the foot of the calendar for hearing at the present term.

And it is further ordered that the appellees serve on the counsel for the appellant the amendments proposed to said bill within ten days from this date.

60 *Amended Bill of Exceptions.*

The Circuit Court for the County of Isabella.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

At a session of the circuit court held at the court-house on the 11th day of December, A. D. 1882, before the Hon. Henry Hart, circuit judge, the issue joined between the parties in this cause came on to be tried by a jury of said county of Isabella, for that purpose duly impanneled, good and lawful men of said county, at which day came there as well the said plaintiff and the said defendants, by their respective attorneys, and the jurors aforesaid impanneled to try the issue also came, and were then and there duly chosen and sworn to try the issue aforesaid between the parties aforesaid, and upon the trial of said issue the counsel for the plaintiff, to maintain

and prove the issue on his part, produced and offered in evidence certified copies of the United States register and receiver's receipt, dated August 6, 1863, which showed an application and purchase by Lorenzo B. Curtis of the east half of northeast quarter and southwest quarter of northeast quarter section 32, town. 16 north, range
61 4 west, and in connection therewith plaintiff offered in evidence the patent for this land, dated February 10, 1864, conveying the land in controversy to Lorenzo B. Curtis.

The counsel for plaintiff, further to prove and maintain the issue on his part, produced and offered in evidence a deed, dated Sept. 16, 1863, from Lorenzo B. Curtis and wife to Timothy Jerome and Alfred Willey, conveying the land in controversy.

The counsel for plaintiff in this case, to further maintain and prove the issue on his part, produced and offered in evidence a deed, dated Nov. 15, 1865, from Timothy Jerome to Alfred Willey, of the lands in controversy in this case.

The counsel for plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a paper claimed by him to be a certified copy of the petition in bankruptcy filed by Alfred Willey in the district court of the United States for the eastern district of Michigan, with the schedule thereunto annexed, filed with the clerk of said court on the 19th day of September, 1871, which was objected to by counsel for defendant, for the reason that the same is incompetent, irrelevant, and immaterial; which petition is as follows:

To the Hon. John W. Longyear, judge of the district court of the United States for the eastern district of Michigan:

The petition of Alfred Willey, of the city and county of Saginaw, and State of Michigan, and district aforesaid, respectfully rep-
62 resents that he has resided for more than five years next immediately preceding the filing of this petition at said Saginaw city, within said judicial district; that he owes debts exceeding the amount of three hundred dollars and is unable to pay all the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors and desires to obtain the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 3, 1867; that the schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the provisions of said act, and that he

may be decreed to have a certificate of discharge from all his debts provable under the same.

ALFRED WILLEY.

WM. H. SWEET,
Attorney for Petitioner.

UNITED STATES OF AMERICA, }
Eastern District of Michigan, } ss:

63 I, Alfred Willey, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information and belief; and I do further make oath that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

ALFRED WILLEY.

Subscribed and sworn to before me this 14th day of September, A. D. 1871.

BENJ. J. BROWN,
Register in Bankruptcy.

Schedule "B," annexed to said petition, contains a particular description of all the real estate owned by said petitioner at the date of filing said petition, and is in the words and figures following:

"South half of southeast quarter of section 26, and northwest quarter of northeast quarter of section 35, town. 15 north, range 5 west. Isabella county, Mich., 120 acres; west half of northwest quarter, east half of northeast quarter, and southwest quarter of northeast quarter of section 32; the southeast quarter of southeast quarter of section 30, town. 16 north, range 4 west, Isabella county, Michigan, 240 acres, no incumbrance, title perfect; north half of northeast quarter, northeast quarter of northwest quarter, and north half of southeast quarter, section 7, town. 17 north, range 6 west, Isabella county, Mich.; southwest quarter of southeast quarter,
64 southeast quarter and east half of southeast quarter of section 1, west half of northwest ¼ of section 15, and south half of southwest quarter of section 32, town. 17 north, range 7 west, Osceola county, Michigan, 520 acres, encumbered by mortgage executed by petitioner and wife May 16, 1868, to Franklin P. Sears, of East Saginaw, Michigan, amount unpaid and due at this date for principal and interest, as near as petitioner can estimate the same, is the sum of $4,170."

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a paper claimed by him to be a certified copy of the petition made by William Gillette, assignee, dated April 2, 1880, and presented to the district court of the United States for the eastern district of Michigan, for the purpose of obtaining an order from said court authorizing the sale of the interest of the bankrupt in the lands in controversy in this case, which was objected to as incompetent and immaterial. Said petition is as follows:

In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILLEY, Bankrupt.

To the Hon. Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan:

The petition of William Gillette, of the city of East Sagi-
65 naw, in the State of Michigan, and district aforesaid, respectfully represents that he was duly appointed by the court assignee of the estate of Alfred Willey, the above-named bankrupt; that no property, money, or effects has come into his hands as such assignee of such estate, except as is hereinafter stated from the schedule of said bankrupt. It appears that the said bankrupt, at the time of the filing of his petition, claimed an interest in the following real estate, to wit: South half of southeast quarter section 26, northwest quarter of northeast section 35, in township 15 north, of range 5 west; also west half of northwest quarter, southwest quarter of northeast ¼, east half of northeast quarter section 32, east half of southeast quarter section 19, and southeast quarter of southeast quarter section 30, in township 16 north, of range 4 west, said land being in Isabella county, Michigan.

Your petitioner, having no funds belonging to said estate in his hands, did not investigate the title of said bankrupt to said land, and believing that said lands were of little value paid no attention to them until recently, when application was made to your petitioner to purchase the right of said bankrupt in said lands. From examination of the records it appears that the lands have been sold for taxes to private parties for a number of years, beginning in 1867; that the right acquired by virtue of the sale of said lands for delinquent taxes is held by one party; in addition to such title
66 has been obtained a deed from the bankrupt of said lands; that another party has by virtue of a sale on execution, based upon a judgment obtained against said bankrupt before he was adjudicated a bankrupt, acquired a title to said lands; that the title to said lands is complicated in this manner, both parties claiming to own said lands by virtue of the title they have acquired thereto in the manner above stated; that, from inquiry and examination, your petitioner believes that the title which may be vested in him as assignee of said bankrupt is of but little value without a lengthy litigation, and your petitioner has no funds in his hands to carry on such litigation or pay taxes that may be assessed thereon; that from information your petitioner sets forth that said lands were located for the pine timber that originally was on the land, which having been removed the lands were not considered by the bankrupt of sufficient value to pay taxes thereon; that petitioner is offered one hundred dollars for the conveyance of the title which he holds as assignee of the said bankrupt to said lands, and upon information and belief your petitioner affirms that said sum is all the interest of said estate in said lands is worth, and that the acceptance of said offer and the conveyance of said title to said lands accordingly

would be for the interest of the creditors of the estate of said bankrupt.

And your petitioner prays that an order may be made in this case authorizing your petitioner to sell said lands at private sale
67 as he may deem advisable, but not at a less sum than one hundred dollars.

And your petitioner further represents that from said schedule it appears that said bankrupt claimed at the date of filing his petition in bankruptcy an interest in the following lands, to wit: North half of northeast quarter, northeast quarter of northwest quarter, north half of southeast quarter, section 27, township 18 north, of range six west; also southwest quarter of northeast quarter, southeast quarter of southwest quarter, and east half of southeast quarter section 1, west half of northwest quarter section 15, south half of southeast quarter section 22, township 17 north, of range seven west, which property was encumbered at the date of the bankrupt's petition by mortgage executed by the bankrupt and his wife to Franklin P. Sears, of East Saginaw, Michigan. The amount due on the mortgage at the date of the filing of said petition was five thousand one hundred dollars. Said mortgage was dated May 16, 1868; that said mortgage has been foreclosed and the property described in said mortgage sold for the benefit of the mortgagee; that any right said bankrupt may have had in said land at the time of the filing of his said petition in bankruptcy appears to have been taken from the estate by virtue of said foreclosure; that petitioner has as yet been unable to dispose of the title of said bankrupt in said land, and has had no offer for the same, but as these lands are all
68 the property that has come into the hands of your petitioner, and as your petitioner is desirous of closing up the estate your petitioner asks that he may have a like order for the sale of the lands above described, at a private sale, for the best price he can obtain therefor.

Wherefore he prays that he may be authorized to make sale of said property in said manner stated.

WILLIAM GILLETTE, *Assignee.*

EASTERN DISTRICT OF MICHIGAN, } ss:
County of Saginaw, }

On this 2d day of April, A. D. 1880, personally appeared the above-named William Gillette, who, being duly sworn, says he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same are true as therein set forth.

THOS. M. JAMES,
Register in Bankruptcy.

Filed April 3, 1881, at 9 a. m.

JNO. GRAVES, *Dep. Clerk.*

In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILLEY, a Bankrupt. Eastern District of Michigan.

I, D. J. Davison, clerk of the district court of the United States for said district, do hereby certify the above and foregoing to be true copies respectively of the following original papers on file
69 and of record of my office, to wit: The petition of said bankrupt to be adjudged bankrupt, and schedule thereto annexed, filed in my office on September 19th, 1871, and the petition of William Gillette, the assignee of said bankrupt, for leave to sell certain lands, filed in my office on April 3d, 1880; that I have carefully compared the above copies with said originals, and that they are true copies of the whole of said original papers respectively. In testimony whereof I have hereunto set my hand and affixed the seal of said court at Detroit, in said District, on this 19th day of October, A. D. 1882.

D. J. DAVISON, *Clerk*,
By JNO. GRAVES, *Dept. Clerk*.

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a paper claimed by him to be a certified copy of the order of said court authorizing the assignee to sell said lands, which was objected to by the counsel for the defendant for the reason that the same is incompetent, irrelevant, and immaterial, which is as follows:

In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILLEY, a Bankrupt. At Detroit, April 5, A. D. 1880. Eastern District of Michigan.

On reading and filing the petition of William Gillette, assignee of the estate of the above-named bankrupt, it is ordered by the
70 court that the said William Gillette, assignee of the estate of the above-named bankrupt, be, and he is hereby, authorized and directed to sell, at private sale, for the sum of one hundred dollars, the following-described real estate, to wit:

South half of southeast quarter section 26, northwest quarter of northeast quarter section 35, in township 15 north, of range 5 west; also west half of northwest quarter, southwest quarter of northeast quarter, east half of northeast quarter, section 32, east half of southeast quarter section 19, and southeast quarter of southeast quarter section 30, in township 16 north, of range 4 west, said land being in Isabella county, State of Michigan, and execute and deliver a proper deed for the same to the purchaser.

And it is further ordered by the court that the said assignee be also authorized and directed to sell at private sale, as a whole or in parcels, as may be considered by him advisable, the following lands, for the best price or prices he may be able to obtain therefor, to wit:

North half of northeast quarter, northwest quarter, north half of southeast quarter, northwest quarter, north half of southeast quarter section 7, township 17 north, range 6 west; also southwest quarter of northeast quarter, southeast quarter of southwest quarter, and east half of southeast quarter section 1, west half of northwest quarter section 15, south half of southwest quarter section 21, township 17 north, of range 7 west.

Witness the Hon. Henry B. Brown, judge of said court, and
71 the seal thereof, at Detroit, in the said district, on the 5th day of April, A. D. 1880.

[SEAL OF COURT.]

D. J. DAVIDSON,
Clerk of said Court,
By JNO. GRAVES,
Deputy Clerk.

The counsel for the plaintiff, to further maintain and prove the issue on his part, produced and offered in evidence papers claimed by him to be certified copies of the papers on file in said district court in the matter of Alfred Willey, bankrupt, as follows: First. Order of the register in bankruptcy of said court adjudicating said Alfred Willey a bankrupt on the petition aforesaid; date of said order, January 3, 1872. Second. Order of said register, dated February 15, 1873 (there being no opposing interest), appointing William Gillette assignee of the estate of said bankrupt. Third. Acceptance of William Gillette, dated February 13, 1873, of said appointment as assignee of the estate of Alfred Willey, the bankrupt aforesaid. Fourth. Bond of said assignee, William Gillette, dated February 20, 1873, given as required by law in such cases, and the approval by said court. Said several papers were filed by the register in bankruptcy of said court with the clerk of the district court of the United States for the eastern district of Michigan, April 2, 1880, which were each objected to by counsel for defendants for the reason that the same is incompetent, irrelevant, and immaterial, and which were as follows:

72 In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILEY, by whom a petition for adjudication in bankruptcy was filed on the 19th day of September, A. D. 1871, in said court.

At East Saginaw, in said District, on the 3d day of September, A. D., 1872, before me, Benj. J. Brown, one of the registers of said court in bankruptcy.

I, the undersigned, a register of said court in bankruptcy, upon good proof before me taken, do find that the said Alfred Wiley has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 21, 1867, and I do hereby declare and adjudge him a bankrupt accordingly.

BENJ. J. BROWN,
Register in Bankruptcy.

Received and filed this 2d day of April, 1880, at 9 o'clock a. m.
JNO. GRAVES,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILLEY, Bankrupt.

At East Saginaw, in said District, on the 15th day of February, A. D. 1873, before me, Benjamin J. Brown, register in bankruptcy.

EASTERN DISTRICT OF MICHIGAN, *ss:*

The creditors of the above-named bankrupt having failed
73 to make choice of an assignee of the said bankrupt estate, I do hereby appoint as such assignee, there being no opposing interest, William Gillett, of East Saginaw, in the county of Saginaw, and State of Michigan, and direct that he give bonds, with the surety, in the form prescribed by the general order or rules of this court, to be given by said assignee, by publishing in newspapers, be, unless otherwise especially ordered, published in the Saginaw Enterprise and Saginaw Courier.

B. J. BROWN,
Register in Bankruptcy.

Received and filed April 2nd, 1880, at 9 o'clock a. m.
JOHN GRAVES,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Michigan. In Bankrupty.

In the Matter of ALFRED WILLEY, Bankrupt.

At East Saginaw, in said district, on the 13th day of February, A. D. 1873, before me, Benj. J. Brown, register in bankruptcy.

EASTERN DISTRICT OF MICHIGAN, *ss:*

To William Gillett, Esq., of East Saginaw, in the county of Saginaw and State of Michigan:

I do hereby certify to you that you were duly appointed assignee of the estate and effects of the above-named bankrupt at the first meeting of creditors, of the 13th day of February, A. D. 1873, a copy of the order of appointment being herewith delivered to you.

BENJ. J. BROWN,
Register in Bankruptcy.

Received and filed April 2nd, 1880, at 9 o'clock a. m.
JOHN GRAVES,
Deputy Clerk.

74 To whom it may concern:

Be it known that I hereby signify my acceptance of the trust of assignee of the estate of above-named bankrupt this 13th day of February, A. D. 1873.

WILLIAM GILLETT.

Received and filed April 2d, 1880, at 9 o'clock a. m.

JOHN GRAVES,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Michigan.

In the Matter of ALFRED WILLEY, Bankrupt.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Know all men by these presents that we, William Gillett, of East Saginaw, and Bradley M. Thompson, of the same place, are held and firmly bound to the United States of America in the just and full sum of one thousand dollars, to the payment whereof, well and truly to be made, we bind ourselves and each of our heirs, executors, and administrators.

Signed, sealed, and delivered this 20th day of February, A. D. 1873.

The said William Gillett having been, on the 15th day of February, A. D. 1873, by order of the district court of the United States for the eastern district of Michigan in bankruptcy, appointed assignee of the estate of Alfred Willey, a bankrupt, this bond is executed pursuant to the 13th section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and is conditioned for the due and faithful discharge of all duties by the said William Gillett as said assignee, and in compliance with order and directions of the court in the matter of bankruptcy of the said Alfred Willey.

WILLIAM GILLETT. [SEAL.]
BRADLEY M. THOMPSON. [SEAL.]

Signed, sealed, and delivered in the presence of—
THOS. M. JAMES.
75 D. W. PERKINS.

Received and filed this 2d day of April, 1880, at 9 o'clock a. m.

JOHN GRAVES,
Deputy Clerk.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, D. J. Davidson, clerk of the district court of the United States for said district, do hereby certify the above and foregoing to be a true copy of each of the original papers above named, respectively, to wit: order of adjudication, order appointing assignee, acceptance of trust of assignee, bond of assignee, and order of sale of real

estate, on file and of record in my office in the matter of Alfred Willey, a bankrupt; that I have carefully compared the same with said original papers respectively, and that they are true copies respectively of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Detroit, in said district, on the 21st day of December, A. D. 1880.

[SEAL OF COURT.] D. J. DAVIDSON, *Clerk.*
By JOHN GRAVES,
Deputy Clerk.

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a paper claimed by him to be a certified copy of the assignment in bankruptcy of all their estate, real or personal, alleged aforesaid, made by B. J. Brown, register in bankruptcy, dated the 21st day of February, A. D. 1873, to William Gillett, assignee of said bankrupt, which was objected to as being incompetent, irrelevant, and immaterial. Said paper is as follows:

In the District Court of the United States for the Eastern District of Michigan. In Bankruptcy.

In the Matter of ALFRED WILLEY, Bankrupt.

76 Know all men by these presents that William Gillett, of East Saginaw, in the county of Saginaw, State of Michigan, in said district, has been duly appointed assignee in said matter.

Now, therefore, I, Benjamin J. Brown, register in bankruptcy in said district, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to said William Gillett, assignee as aforesaid, all the estate, real and personal, of the said Alfred Willey, bankrupt aforesaid, including all the property of whatever kind of which he is possessed, or in which he was interested or entitled to have on the 19th day of Sept., A. D. 1871, with all his deeds, books, and papers relating thereto, excepting such property as is exempt from the operation of this assignment by the provision of said 14th section of said act; to have and to hold all the foregoing premises to said William Gillett and his heirs forever in trust, nevertheless, for the uses and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register, have set my hand and caused the seal of said court to be affixed this 21st day of February, A. D. 1873.

[SEAL OF COURT.] BENJ. J. BROWN,
Register in Bankruptcy.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I, D. J. Davidson, clerk of the district court of the United States for said district, do hereby certify the above and foregoing to be

a true copy of the original deed of assignment on file and of record in my office in the matter therein entitled; that I have carefully compared the same with said original and the record thereof, and that it is a true transcript therefrom and of the whole of said original deed and record thereof.

In testimony whereof I have hereunto set my hand and
77 affixed the seal of said court, at Detroit, in said district, on the 14th day of April, A. D. 1882.

[L. S.] D. J. DAVIDSON, *Clerk.*
By JNO. GRAVES,
Deputy Clerk.

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered in evidence a deed dated April 13, 1880, made by William Gillette, assignee in bankruptcy of Alfred Willey, bankrupt, to the plaintiff in this cause, conveying the land in controversy, said deed having been made in pursuance of the above order.

The counsel for the plaintiff, further to maintain and prove the issue on his part, produced and offered evidence tending to show that defendants claimed, at the commencement of this suit, an interest in the land in controversy, and then rested his case.

The defendants, to maintain and prove the issue on their part, produced and offered in evidence a deed from the auditor general of the State of Michigan to Isaac W. Bush, bearing date Dec. 18, 1868, recorded in liber 4 of deeds of Isabella county, on page 152, being for sale of this land for delinquent taxes for 1867. Said deed conveys the land in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a deed from auditor general to Isaac W. Bush, dated Dec. 18, 1868, recorded Jan. 12, 1869,
78 in liber 4 of deeds, p. 156, for delinquent taxes of 1867, conveying the land in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a deed from Isaac W. Bush to William McPherson, Jr., defendant, dated March 7, 1870, recorded Sept. 29, 1870, in liber 6 of deeds, p. 182, conveying the land in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence eight separate deeds from the auditor general to William McPherson, Jr., for the sale of the land in controversy for the delinquent taxes for the years 1868, 1869, 1870, 1872, 1873, 1874, 1875, 1876, said deeds being duly recorded in said county.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a quit-claim deed, dated Sept. 11, 1875, recorded Sept. 11, 1875, in liber 15 of deeds, p. 303, from Alfred Willey to William N. Brown—consideration, $250—conveying the land in controversy and other lands.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a quit-claim deed, dated Oct.

19, 1875, recorded Dec. 4, 1875, in liber 5 of deeds, p. 549, from Anna M. Willey, wife of Alfred Willey, patentee of this land, to William N. Brown, conveying the land in controversy.

79 The defendants, to further maintain and prove the issue on their part, produced and offered in evidence a deed, dated Nov. 6, 1875, recorded Dec. 6, 1875, in liber 15 of deeds, p. 553, from William N. Brown to William McPherson, Jr., said deed conveying an undivided one-half interest in the lands in controversy.

The defendants, further to maintain and prove the issue on their part, produced and offered in evidence a deed, dated Dec. 4, 1875, recorded Dec. 8, 1875, liber 16 of deeds, p. 588, from William McPherson, Jr., to William N. Brown; said deed conveyed an equal undivided one-half interest in the land in controversy.

The counsel for the defendants, further to maintain and prove the issue on their part, called WILLIAM N. BROWN, who, being duly sworn, testified as follows:

I am the man who bought the land from Willey that is shown by a deed in evidence in this case. I can't exactly fix the date when I first had notice of the proceeding in bankruptcy in the United States court against Alfred Willey. It was some time after the deed from the assignee to the plaintiff was placed on record. I think the first knowledge I had was from the plaintiff himself. That is the first intimation I had of the existence of any such proceedings or any proceedings in the bankrupt court with Alfred Willey, bank-

80 rupt. I had no notice of any application to the district court to sell the land in controversy on the part of the assignee. I never heard of it until after the matter was put on record here, and I think the plaintiff himself came to me and claimed title to the property; it was after the deed was put on record here.

It is admitted between the counsel for the respective parties the only paper purporting to be an assignment by the court or register in bankruptcy that was ever recorded in Isabella county was recorded on the 19th day of April, 1880, a copy of which is set out in this bill of exceptions, and it was also admitted by counsel for the plaintiff that neither of the defendants had any notice of any of the bankruptcy proceedings until after they purchased.

The defendants here rested their case.

The counsel for the plaintiff then addressed the court as follows: "If the court please, I suggest that we present the case so far to the court, and if the court thinks that the plaintiff has not made out a case to charge the jury to that effect will save a good deal of time in invalidating these tax titles. If the court thinks, on the contrary, that the plaintiff has made out a case we can go into the question of the validity of these tax titles."

It was thus intimated by the court: "As the case now stands, irrespective of the validity of these tax titles, I shall charge

81 the jury that the plaintiff cannot recover."

The counsel for the plaintiff then made the following offer:

I now offer to show to the court that the taxes for the several years for which deeds have been offered in evidence by the defendants in this case are void, on account of a want of a proper certificate of the supervisor on the original assessment roll of the township where the land in controversy is situated; that in each of these years the supervisor had omitted from his certificate these words, that he had assessed the lands in his township at their "true cash value, and not at the price it would sell for at a forced or auction sale," and by reason of said omission the taxes were illegal and said deeds offered in evidence were void.

But the circuit judge did then and there declare and deliver his opinion that as he had decided to charge the jury that the plaintiff had shown no title to the land in controversy, and that defendants were entitled to a verdict, it was immaterial whether the tax titles offered by defendants were valid or not, and then and there refused to receive such evidence or to allow plaintiff to show that the tax titles for any or all of said years were invalid; to which opinion and decision of the said circuit judge, and to his refusal to admit such evidence, the said counsel for the plaintiff did then and

82 there except.

The counsel for plaintiff then requested the court to charge the jury as follows:

1. The title of this land was vested in the assignee, and the assignee took such proceedings as the law requires in such cases to convey the title to the plaintiff, and the plaintiff had all the title that Willey had at the time of the adjudication in bankruptcy to the said lands, and the evidence in this case shows that the plaintiff's title was valid.

2. That in this case the plaintiff has shown, through mesne conveyances from the Government, a title in himself, and has made out a *prima facie* case entitling him to recover.

Which said requests to charge so made by the counsel for the plaintiff as aforesaid were by said circuit judge refused. Thereupon the counsel for said plaintiff did then and there, on behalf of the said plaintiff, except to the opinion of said circuit judge and his refusal to charge as requested.

And the said circuit judge did then and there declare and deliver his opinion to said jury as follows:

GENTLEMEN OF THE JURY: In this case I do not think the plaintiff has by any testimony introduced in court established any title in himself to the land in controversy. I therefore charge you, as a matter of law, that the defendants are entitled to a verdict in this case.

83 The counsel for the plaintiff did then and there except to the opinion of the circuit judge, which says: "In this case I do not think the plaintiff has by any testimony introduced in court established any title to the land in controversy," and directing a verdict for defendant.

And the jury, under the direction of the court, then and there gave their verdict that the said defendants did not unlawfully with-

hold from the plaintiff the possession of the east half of the northeast quarter and southwest quarter of northeast quarter of section 32, township 16 north, of range 4 west, being the premises described in the declaration in this cause.

And forasmuch as the said several matters so introduced and given in evidence on the part of the plaintiff and by his counsel aforesaid do not appear by the records of said trial and verdict, and because none of the exceptions so offered and made to the opinion and decision of said circuit judge do appear upon the records of said trial, the said counsel for the said plaintiff did then and there prepare the aforesaid exceptions to the opinion of the said circuit judge and request him to sign the bill of exceptions containing the several matters aforesaid, pursuant to the statute in such case made and provided, and thereupon the said circuit judge, at the request of the counsel for the plaintiff aforesaid, hath signed this bill of exceptions, pursuant to the statute aforesaid, on this 21st day of February, A. D. 1883.

HENRY HART,
Circuit Judge.

(Endorsed:) Filed April 18, 1883. L. C. Griffith, clerk.

84 At a session of the supreme court of the State of Michigan held at the supreme court-room in the city of Lansing on the fourth day of April, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Benjamin F. Graves, chief justice; Thomas M. Cooley, James V. Campbell, associate justices.

JAMES A. WISNER, Plaintiff & Appellant,
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr., Defendants.

A motion having been made in this cause to remand the bill of exceptions filed therein for correction and amendment, and the same having been heard, by consent of counsel for appellant, it is ordered that the motion be allowed, and that the said bill of exceptions be remanded to the circuit court for the county of Isabella for such correction and amendment as the circuit judge may see fit to make, and that the cause go to the foot of the calendar for hearing at the present term.

And it is further ordered that the appellees serve on the counsel for the appellant the amendments proposed to said bill within ten days from this date.

85 STATE OF MICHIGAN, *ss:*

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom and of the whole of said original order.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court at Lansing this 5th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of Supreme Court.]

CHAS. C. HOPKINS, *Clerk.*

To the supreme court of the State of Michigan:

The execution of the within order appears by transcript of record hereto annexed.

April 23d, 1883.

L. C. GRIFFITH,
Clerk of the Circuit Court.

(Endorsed): Filed April 24, 1883. Chas. C. Hopkins, clerk.

86 At a session of the supreme court of the State of Michigan held at the supreme court-room in the city of Lansing on the twenty-sixth day of April, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Benjamin F. Graves, chief justice; Thomas M. Cooley, James V. Campbell, associate justices.

JAMES A. WISNER, Plaintiff & Appellant,
vs.
WILLIAM N. BROWN and WILLIAM McPHERSON, Jr., Defendants.

This cause coming on to be heard is argued by counsel and submitted.

87 At a session of the supreme court of the State of Michigan, held at the supreme court-room in the city of Lansing on the sixth day of June, in the year one thousand eight hundred and eighty-three.

Present: The Honorable Benjamin F. Graves, chief justice; Thomas M. Cooley, James V. Campbell, associate justices.

JAMES A. WISNER, Plaintiff & Appellant,
vs.
WILLIAM N. BROWN and WILLIAM McPHERSON, Jr., Defendants.

The record and proceedings in this cause having been removed to this court by a writ of error issued to the circuit court for the county of Isabella, and the same and the matters in error assigned having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings and in the giving of judgment in said circuit court there is no error, therefore it is ordered and adjudged that the judgment of said circuit court for the county of Isabella be, and the same is hereby, in all things affirmed, and that the defendants do recover of the plaintiff their costs, to be taxed, and that they have execution therefor.

88 In Supreme Court.

JAMES A. WISNER
vs.
WILLIAM N. BROWN & WILLIAM M. MCPHERSON, JR.

The title which the plaintiff relies upon in this case is the same which was in issue in the case of Wisner *v.* Wirth, 48 Mich., 291. The plaintiff claims under a sale made to him by the assignee in bankruptcy of one Willey, and the defendants claim under a conveyance made by Willey after he became bankrupt, but before the fact was known to the grantee, and also under sales made of the land for delinquent taxes.

In Wisner *v.* Wirth the plaintiff was held to have failed in the formal proofs, but these are now supposed to be complete, so as to present the whole merits. Willey, it appears, filed his petition to be adjudged bankrupt September 14, 1871. In one of the schedules to his petition the land now in controversy was de-cribed as constitut- a part of his assets. The adjudication of bankruptcy was made, and an assignee appointed February 15, 1873. The assignee took no steps towards a sale of the lands for more than seven years, and in September, 1875, Willey made sale of them to defendant Brown, who bought in reliance upon the record title. On the third day of April, 1880, the assignee presented to the bankrupt court his
89 petition for leave to sell the land at private sale.

The petition recites: "Your petitioner, having no funds belonging to said estate in his hands, did not investigate the title of said bankrupt to said land, and, believing that said lands were of little value, paid no attention to them until recently, when application was made to your petitioner to purchase the right of said bankrupt in said lands. From examination of the records it appears that the lands have been sold for taxes to private parties for a number of years, beginning in 1867; that the right acquired by virtue of the sale of said lands for delinquent taxes is held by one party; in addition to such title a deed has been obtained from the bankrupt of said lands; that another party has, by virtue of a sale on execution, based upon a judgment obtained against said bankrupt before he was adjudicated a bankrupt, acquired a title to said lands; that the title to said lands is complicated in this manner, both parties claiming to own said lands by virtue of the title they have acquired thereto in the manner above stated; that from inquiry and examination your petitioner believes that the title which may be vested in him as assignee of said bankrupt is of but little value without a lengthy litigation, and your petitioner has no funds in his hands to carry on such litigation or pay taxes that may be assessed thereon;
90 that from information your petitioner sets forth that said lands were located for the pine timber that originally was on the land, which having been removed the lands were not considered by the bankrupt of sufficient value to pay taxes thereon; that petitioner is offered $100 for the conveyance of the title which he holds, as assignee of said bankrupt, to said lands, and upon information and belief your petitioner affirms that said sum is all the in-

terest of said estate in said lands is worth, and that the acceptance of said offer and the conveyance of said title to said lands accordingly would be for the interest of the creditors of the estate of said bankrupt. And your petitioner prays that an order may be made in this case authorizing your petitioner to sell said lands at private sale as he may deem advisable, but not at a less sum than one hundred dollars."

The prayer of the petitioner was granted, and an order entered that the assignee be "authorized and directed to sell at private sale for the sum of one hundred dollars the following-described real estate," describing it.

The assignee thereupon proceeded to sell to the plaintiff for the sum named, giving no notice to Brown, who only heard of the sale when the plaintiff went with his deed to assert his title. Brown's evidence on the subject was as follows: "I am the man who bought the land
91 from Willey that is shown by a deed in evidence in this case. I can't exactly fix the date when I first had notice of the proceeding in bankruptcy in the United States court against Alfred Willey. It was some time after the deed from the assignee to the plaintiff was placed on record. I think the first knowledge I had was from the plaintiff himself; that is the first intimation I had of the existence of any such proceedings or any proceedings in the bankrupt court with Alfred Willey, bankrupt. I had no notice of any application to the district court to sell the land in controversy on the part of the assignee. I never heard of it until after the matter was put on record here, and I think the plaintiff himself came to me and claimed title to the property. It was after the deed was put on record here."

Upon the showing thus made by the parties, respectively, the circuit judge was of the opinion that the plaintiff had failed to make out a *prima facie* case, and directed a verdict for the defendants.

The grounds of supposed invalidity in the plaintiff's title are—first, that the assignee had no authority to make sale of property, the title to which was in dispute, without first giving notice to the adverse claimants; and, second, that all authority he ever had to make sale was lost by lapse of time before the sale was actually attempted. The first of these objections to the sale is made upon the provisions of section 5063 of the Revised Statutes of the United
92 States (1878), which provides that "whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into the possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, or as the court shall deem reasonable, order it to be sold under the direction of the assignee, who shall hold the funds received in place of the estate disposed of, and the proceeds of the sale shall be considered the measure of the value of the controversy in any suit or controversy between the parties in any court."

There has always been some question concerning the exact meaning of this provision. It seems to contemplate the seizure and sale

by the assignee of the whole property, and the extinguishment of all title in the adverse claimant; but this, as was pointed out by Mr. Justice Clifford and in Knight *v.* Cheney, 5 N. B. R., 305, would be quite beyond the power of any legislative body to provide for—at least in cases where the adverse party was in possession. But whether the sale contemplated is of the whole property, or only of the bankrupt's interest, there is no ambiguity in respect to the requirement of notice, which is imperative; and, as the power of the assignee to sell and convey the estate of the bankrupt depends entirely upon the statute, a sale and conveyance by him in any other mode than the one prescribed would be a mere nullity. This has been held in several cases where the defect in the proceed-
93 ings consisted in the failure to comply with the requirement of notice in this section. Shaw *v.* Lindsey, 60 Ala., 344; Stanley *v.* Sutherland, 54 Ind., 339; Meeks *v.* Whatley, 48 Miss., 337.

The doubt in this case arises upon the fact that the sale was ordered by the bankrupt court, and that the judge neither required notice of the application nor directed notice to the adverse claimant before the sale should be made. In making the order without previous notice he must be understood to have decided that such previous notice was not essential; and it is to be observed that he ordered a sale, not of the whole property, but only of the bankrupt's interest therein, and it is not very obvious that an adverse claimant could have any right to be heard on the question of making such an order, or any privilege of resisting it.

But the importance of his knowing that a sale was to be made is apparent, not only because he of all persons would be likely to become a bidder, but also because the bankrupt estate would be interested in having his competition with others. And if the sale was ordered without express requirement of notice it does not follow that the judge contemplated or intended that the sale should be so made or that the order should be understood as permitting it. Counsel, when their petitions are granted, are allowed to draw up their orders themselves, and it is not expected that the personal attention of the judge will be called to all their details. When he grants a prayer of a petition he has in mind only the general purpose to which he gives his assent; and he trusts to counsel to put the assent
94 in due form, so as to make the order and the proceedings under it harmonize with the requirements of the law. If the law makes notice essential it will not be understood that the court has assented to dispensing with it, even though the order as drawn up omits to incorporate the requirement.

In *ex parte* Bryan, 14 N. B. R., 71, it appeared that the register in bankruptcy had made an order for the sale "at public or private sale" of a disputed claim of the bankrupt upon his father's estate, and the assignee had made private sale for a small sum without notice to contestants. Judge Hughes held that the register had no power to make the sale; but he also expressed the opinion in the most positive terms that had the sale been ordered by the court it would, when thus made, be altogether null and incapable of ratification. This opinion is entitled to great respect, and seems to us

reasonable and sound. And the wisdom of the requirement of notice is well illustrated by the facts of this case, in which the bankrupt's title to several hundred acres of land was sold for a merely nominal sum, when there is every reason to believe it would have have brought a substantial price if the intended sale had been properly notified.

The other objection to the sale arises under Rev. St. U. S. (1878), § 5057, which provides that "no suit, either at law or in equity, shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." As the assignee might have brought action against Brown at any time after the latter set up title, there is much reason for saying the case is within the statute. See Bailey *v.* Glover, 21 Wall., 342. But it is not necessay to so decide on this record.

95

The judgment is affirmed, with costs.

T. M. COOLEY.
B. F. GRAVES.
J. V. CAMPBELL.

(Endorsed:) Filed June 6, 1883. Chas. C. Hopkins, clerk.

96 *Appellees' Taxed Bill of Costs.*

In the Supreme Court, State of Michigan.

JAMES A. WISNER, Plaintiff & Appellant,
vs.
WILLIAM N. BROWN & WILLIAM McPHERSON, Jr., Defendants.

Attorney fee on hearing	$30 00
Printing brief	10 80
Affidavit to fee bill	25
Taxation of costs	25
	$41 30
Deduct	25
	$41 05

STATE OF MICHIGAN, } ss:
County of Isabella, }

William N. Brown, being duly sworn, says that the foregoing items of costs charged as disbursements have actually been paid, or the liabilities therefor incurred, and were necessary and are reasonable in amount.

WILLIAM N. BROWN.

Sworn to and subscribed before me this 16th day of June, A. D. 1883.

DEXTER F. ARNOLD,
Notary Public.

97 To H. H. Hoyt, att'y for plaintiff and appellant:

Take notice, the foregoing is a true and correct copy of defendants' bill of costs in this cause and of the affidavit of disbursements required by rule. Application will be made to the clerk of said court, at his office, on the 29th day of June, A. D. 1882, at 10 o'clock a. m., to tax the same.

Yours, &c., BROWN & LEATON,
Att'ys for Defendants.

Dated at Mt. Pleasant, June 19, A. D. 1883.

STATE OF MICHIGAN, } ss.
County of Isabella, }

P. F. Dodds, being duly sworn, says that on the 19th day of June, A. D. 1883, at 10 o'clock a. m., he served a true copy of the above bill of costs, with the affidavit and notice of application for taxation, upon H. H. Hoyt, attorney for plaintiff, by putting the same in the post office at Mt. Pleasant, Michigan, directed to said H. H. Hoyt at East Saginaw, Michigan, postage fully prepaid, and the same was done at request of defendants' att'ys.

P. F. DODDS.

Sworn and subscribed before me this 19th day of June, A. D. 1883.

DEXTER F. ARNOLD,
Notary Public, Isabella Co., Mich.

—— consent to the taxation of the within bill of costs at the sum of —— dollars and —— cents, on condition, however, that ——.

Dated this —— day of ——, A. D. 188–.

——— ———,
Attorney for ——.

[Endorsed:] No. 6745. The supreme court, State of Michigan. James A. Wisner *vs.* William N. Brown & William McPherson, Jr. Taxed bill of costs for defendants. I do hereby tax the costs of defendants in the sum of forty-one dollars and five cents. Chas. C. Hopkins, clerk. Dated June 29, A. D. 1883. *Præcipe* for *fi. fa.* Let a writ of *fi. fa.* issue in this case. To sheriff of —— county. Yours, &c, ——, ——, att'y for ——. Dated ——, 188–.

98 Supreme Court of Michigan.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, Jr.

And now comes said plaintiff, James A. Wisner, and claims an appeal to the Supreme Court of the United States from the judgment rendered in this cause in favor of the above-named defendants.

H. H. HOYT,
Plaintiff's Attorney.

(Endorsed:) Filed June 29, 1883. Chas. C. Hopkins, clerk.

99 The United States of America to William N. Brown and William McPherson, Jr., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein James A. Wisner is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Benj. F. Graves, chief justice of the supreme court of Michigan, this 4th day of August, A. D. 1883.

BENJAMIN F. GRAVES,
Chief Justice.

STATE OF MICHIGAN, } ss:
County of Isabella, }

On this 13 day of August, A. D. 1883, personally appeared Wm. Pickard before me, the subscriber, a notary public in and for said county, and makes oath that he delivered a true copy of the within citation to Wm. N. Brown, one of the attorneys for the defendants in the above entitled and mentioned cause, personally,
100 at Mt. Pleasant, in said county of Isabella, in the State of Michigan, on the 13th day of August, A. D. 1883; and further deponent saith not.

WILLIAM PICKARD,
Under Sheriff.

Sworn to and subscribed before me this 13th day of August, A. D. 1883.

WILLIAM T. WHITNEY,
Notary Public.

[Endorsed:] 6745. Supreme Court. James A. Wisner, plaintiff in error *vs.* William N. Brown & William McPherson, Jr., defendants in error. Citation. Filed Aug. 20, 1883. A. Chase, dep. clerk. H. H. Hoyt, plaintiff's att'y.

101 Know all men by these presents that I, Jacob Schwartz, of East Saginaw, Saginaw county, and State of Michigan, am held and firmly bound unto William N. Brown and William McPherson, Jr., in the full sum of one thousand dollars, to be paid to the said William N. Brown and William McPherson, Jr., or to their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with my seal and dated this 21st day of July, A. D. 1883.

Whereas lately, at a term of the supreme court of the State of Michigan, in a suit depending in said court between James A. Wisner, as plaintiff, and William N. Brown and William McPherson,

Jr., defendants, judgment was rendered against the said James A. Wisner, and the said James A. Wisner having obtained a writ of error to the Supreme Court of the United States and filed the same in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William N.
102 Brown and William McPherson, Jr., citing and admonishing them to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C., the second day of October next:

Now, the conditions of the above obligation is such that if the said James A. Wisner shall prosecute his writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

JACOB SCHWARTZ. [L. S.]

STATE OF MICHIGAN, } ss:
County of Saginaw, }

Jacob Schwartz, of the city of East Saginaw, county and State aforesaid, being duly sworn, deposes and says that he is a resident and freeholder within this State, and is worth the sum of ten thousand dollars over and above all debts and responsibilities he owes or has incurred.

JACOB SCHWARTZ.

Sworn to and subscribed before me this 21st day of July, A. D. 1883.

JAMES LEITCHFIELD,
Notary Public in and for Saginaw Co., Michigan.

The foregoing bond is approved.
August 4th, 1883.

BENJAMIN F. GRAVES,
Chief Justice Supreme Court of Michigan.

103 Parties: James A. Wisner, plaintiffs & appellants, *vs.* William N. Brown and William McPherson, Jr., defendants.
Plaintiff's attorney: H. H. Hoyt.
Defendants' attorneys: Brown & Leaton.
Error to Isabella.
Costs: Feb, 13, '83, 2.00; July 2, '83, 4.00—$6.00.

JOURNAL.	DATE.	PROCEEDINGS.
	1883.	
	Feb'y 13.	*Præcipe* filed & writ issued, returnable March 6, '83.
	March 10.	Proof of service of notice of writ filed.
	" 10.	Return filed.
	" 12.	Assignment of errors filed.
	" 19.	Note of argument—April term—filed.
	" 19.	Notice of hearing with proof of service filed.
F. 123.	" 26.	Motion entered for an order remanding case, etc.
	April 4.	Ordered entered placing case at foot of docket and remanding record for correction.
	" 6.	Record remitted to clerk Isabella circuit court.
	" 24.	Amended return filed.

F. 189. " 26. Argued and submitted.
" 205. June 6. Judgment affirmed with costs.
" 29. Defendants' costs taxed at $41.05.
" 29. Plaintiff's claim of appeal to Supreme Court U. S. filed.
July 12. *Fi. fa.* to sheriff Saginaw county.
Aug. 13. Writ of error from Supreme Court U. S. received & filed.
" 13. Bond, duly approved, filed.
" 20. Citation, with proof of service, etc., filed.

104 Supreme Court of the State of Michigan.

JAMES A. WISNER
vs.
WILLIAM N. BROWN and WILLIAM MCPHERSON, JR.

STATE OF MICHIGAN, *ss.*:

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the above and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause in said court, as appears of record in my office; that I have compared the same with the original, and that it is a true transcript therefrom and of the whole thereof; that attached thereto are the citation, with proof of service, and copy of the bond, duly approved, filed with the writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this twenty-fifth day of September, A. D. 1883.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS, *Clerk.*

105 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which — in the said supreme court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James A. Wisner, plaintiff, and William N. Brown and William McPherson, Jr., defendants, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said statute, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said
106 Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme

Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 29th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk Circuit Court of United States for the Eastern District of Michigan.

Allowed by—
BENJAMIN F. GRAVES,
Chief Justice of the Supreme Court of the State of Michigan.

June 29th, 1883.

To the Supreme Court of the United States:

The execution of the foregoing writ appears by the transcript of record and proceedings hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Sept. 25, 1883.

107 [Endorsed:] 6745. Supreme court. James A. Wisner *vs.* William N. Brown, William McPherson, Jr. Writ of error. Filed Aug. 13, 1883. Chas. C. Hopkins, clerk. H. H. Hoyt, plaintiff's att'y.

Endorsed on cover: Michigan supreme court. No. 390. James A. Wisner, plaintiff in error, *vs.* William N. Brown and William McPherson, Jr. Filed 11th October, 1883.

122-214

FILED
OCT 23 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1885.

NO. 390.

JAMES A. WISNER,
Plaintiff in Error,

vs.

WILLIAM N. BROWN,
WILLIAM McPHERSON, Jr.

Error to the Supreme Court of Michigan.

Brief for Plaintiff in Error.

S. S. BURDETT, AND
H. H. HOYT,
Attorneys for Plaintiff in Error.

EAST SAGINAW, MICH.:
EVENING NEWS, PRINTERS AND BINDERS.
1886.

Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 29th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk Circuit Court of United States for the Eastern District of Michigan.

Allowed by—

BENJAMIN F. GRAVES,
Chief Justice of the Supreme Court of the State of Michigan.

June 29th, 1883.

To the Supreme Court of the United States:

The execution of the foregoing writ appears by the transcript of record and proceedings hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Sept. 25, 1883.

107 [Endorsed:] 6745. Supreme court. James A. Wisner *vs.* William N. Brown, William McPherson, Jr. Writ of error. Filed Aug. 13, 1883. Chas. C. Hopkins, clerk. H. H. Hoyt, plaintiff's att'y.

Endorsed on cover: Michigan supreme court. No. 390. James A. Wisner, plaintiff in error, *vs.* William N. Brown and William McPherson, Jr. Filed 11th October, 1883.

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Supreme Court of the United States

OCTOBER TERM, 1885.

NO. 390.

JAMES A. WISNER,
Plaintiff in Error,

vs.

WILLIAM N. BROWN,
WILLIAM McPHERSON, Jr.

Error to the Supreme Court of Michigan.

Brief for Plaintiff in Error.

S. S. BURDETT, AND
H. H. HOYT,
Attorneys for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1885.—NO. 390.

JAMES A. WISNER,
Plaintiff in Error,
vs.
WILLIAM N. BROWN and
WILLIAM MCPHERSON, JR.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

Brief for the Plaintiff in Error.

STATEMENT OF THE CASE.

In November, 1881, the plaintiff in error brought ejectment in the usual form against the defendants in error in the Circuit Court for the County of Isabella, Michigan, to determine the right of possession and the ownership of the land described in the declaration (Tr., p. 1).

The declaration was personally served upon the defendants in error, and they appeared in said cause and pleaded the general issue with notice (Tr., p. 1).

December 11, 1882, the cause was tried in said Court and a verdict given under the direction of the Court and a judgment taken thereon in favor of the defendants in error (Tr., p. 7). A writ of error to reverse this judgment was sued out by the plaintiff in error.

The bill of exceptions (Tr., p. 9) and the amended bill of exceptions (Tr., p. 25) sets out all the evidence in the case.

From the bill of exceptions it appears that the land in controversy was located by Lorenzo B. Curtis, August 6, 1863, and patented to him February 10, 1864. That Curtis and wife conveyed this land to Timothy Jerome and Alfred Willey by deed dated September 16, 1863. That Timothy Jerome by deed dated November 15, 1865, conveyed the same to Alfred Willey.

That Alfred Willey being the owner of this land, on the 19th day of September, 1871, filed his petition in the District Court of the United States for the Eastern District of Michigan to be adjudged a bankrupt, and a certified copy of the petition, with the usual schedules attached, were offered in evidence (Tr., p. 26). That in Schedule B, attached to said petition, duly verified by the petitioner as containing an accurate inventory of his estate is described the land in controversy (Tr., p. 27).

On the 3rd day of September, 1872, the said Alfred Willey was adjudged a bankrupt (Tr., p. 31); on February 15, 1873, an assignee was appointed (Tr., p. 32); on the same day the assignee accepted the trust (Tr., p. 33); on February 20, 1873, the assignee gave bonds (Tr., p. 33), and on February 21, 1873, an assignment of all the real and personal property of the said bankrupt Alfred Willey was made to the assignee in due form (Tr., p. 34).

On the 2d day of April, 1880, the assignee presented a petition to the Judge of the District Court of the United States for the Eastern District of Michigan, setting forth in said petition that he had been appointed assignee of said Alfred Willey and that no money had come into his hands as such assignee, but that said Willey claimed to be the owner of certain real estate, describing it. That the land has been sold for the non-payment of taxes. That the bankrupt, after being adjudged a bankrupt, had given a quit-claim deed of the land, and stating the circumstances surrounding the title, and asking the Court to be allowed to sell whatever interest he might have as assignee in said land at private sale. The entire petition appears in the record (Tr., p. 28). After due consideration of the petition, the District Judge made an order dated April 5, 1880, authorizing and directing the assignee to sell the land, describing it at private sale for the price stated by the assignee as having been offered. A copy of the order is in the record (Tr., p. 30).

The assignee on the 13th day of April, 1880, conveyed by deed the land in controversy in pursuance of said order to the plaintiff in error, and after showing that the defendants in error claimed an interest in the land in controversy, the plaintiff in error rested his case.

The defendants in error offered in evidence a number of tax deeds given on the sale of the land for several years for the delinquent taxes assessed thereon. These deeds were given to different persons, but by conveyance from them the title to the land, arising from these several tax sales, whatever it might be vested in the defendants in error at the time of the commencement of this suit. The defendants in error also produced and offered in evidence a quit-claim deed, dated September 11, 1875, from the bankrupt Alfred Willey to William N. Brown, one of the defendants in error, the purported consideration of which was $250, and the deed conveyed the land in controversy with other lands, in all about 640 acres (Tr., p. 35). There was a deed from Anna M. Willey, the wife of Alfred Willey, dated October 19, 1875, to Brown, and a quit-claim deed dated November, 6, 1875, by Brown to McPherson, Jr., of an equal undivided one-half of this land, and McPherson being the owner of the tax interest conveyed by deed dated December 4, 1875, to Brown an undivided one-half interest in this land. At the date of the commencement of this suit, Brown and McPherson each owned an equal undivided one-half interest in the land, based upon the tax titles and the deed from the bankrupt Willey.

Brown, one of the defendants in error, was upon the trial of the cause sworn on his own behalf, and he stated in substance that he purchased the land from Willey, that he did not know of the bankruptcy of Willey, that he had no notice of the application by the assignee to the Court for an order to be allowed to sell the land in controversy until the assignee had conveyed the land to the plaintiff in error. And it was admitted that the assignment to the assignee was not recorded in the County where the land was situated until April 19, 1880.

After the defendants in error had rested their case, the Circuit Judge before whom the case was being tried, said: As the case now stands, irrespective of the validity of these tax titles, he should charge the jury that the plaintiff could not recover. He gave no reason for thus holding the plaintiff's title invalid, and he put out of the case the tax titles held by the defendants (Tr., p. 36). The plaintiff offered to show on

the trial that the taxes for the several years for which deeds had been offered by the defendants were void. This evidence the Court refused to allow (Tr., p. 37).

The counsel for the plaintiff then requested the Court to charge the jury as follows:

1. The title to this land was vested in the assignee, and the assignee took such proceedings as the law requires in such cases to convey the title to the plaintiff, and the plaintiff had all the title that Willey had at the time of the adjudication in bankruptcy to the said lands, and the evidence in this case shows that the plaintiff's title was valid.

2. That in this case the plaintiff has shown through mesne conveyances from the Government, a title in himself, and has made out a *prima facie* case entitling him to recover (Tr., p. 37).

The Court refused to charge the jury as requested by the plaintiff, but did charge the jury as follows:

"In this case I do not think the plaintiff has by any testimony introduced in Court established any title in himself to the land in controversy; I therefore charge you as a matter of law, that the defendants are entitled to a verdict in this case" (Tr., p. 37).

There was no evidence showing the value of the land in controversy, neither was there any evidence showing that this land was in the actual occupation of any one. It was in fact wild and uncultivated, and without any improvement thereon.

The fact that the land was not in the actual possession of any one may become important, when we come to consider the effect to be given to the notice annexed to defendant's plea (Tr., p. 2), which is considered by them as being a plea of the Statute of Limitation. There was no question raised under this plea when the cause was tried in the Circuit, but considerable stress was placed upon this point in the argument in the Supreme Court of Michigan.

Assignment of Errors.

The plaintiff in error by his attorney says, that in the records and proceedings aforesaid there is manifest error in the respect and particulars following, to-wit:

I.

The Supreme Court of the State of Michigan erred in affirming the judgment of said Circuit Court of Isabella County, Michigan, notwithstanding the refusal of said Circuit Court to give said charges as asked by the plaintiff in error on the trial of said cause.

II.

The Supreme Court of the State of Michigan erred in affirming the judgment of said Circuit Court of Isabella County, Michigan, notwithstanding the charge of the Circuit Court that the plaintiff had not by any testimony introduced on the trial, established any title to the land in controversy.

III.

The Supreme Court of the State of Michigan erred in deciding and adjudging that in the record and proceedings of said Circuit Court there was no error.

IV.

The Supreme Court of the State of Michigan erred in not reversing the said judgment of said Circuit Court.

V.

The Supreme Court of the State of Michigan erred in affirming the judgment of said Circuit Court of Isabella County.

ARGUMENT FOR PLAINTIFF IN ERROR.

Had the plaintiff in error the legal title to the land in controversy at the commencement of this suit?

This question was determined against the plaintiff and is the only question involved in this contention. The assignments of error refer to it, and as they all involve the same inquiry in different form, they will be considered together.

The plaintiff has taken for granted that a valid title to lands can be acquired through proceedings in bankruptcy. That the assignee by operation of law is vested with the title, and as title to lands can not be wholly in two persons at the same time, the assignee at the time of the sale of this land to the plaintiff must have had the title, or he must have been divested of it either by his own act or neglect or by the operation of the bankrupt law.

If the title to this land vested in the assignee, if the assignee took the steps required by law to place the legal title to this land in the plaintiff, and if the testimony shows these facts, then the decision of the Court from which we appeal is erroneous.

The records show that Willey was adjudged a bankrupt under the bankrupt law of 1867, and the amendments thereto, on his own petition, and so far as the question is concerned whether or not Willey was a bankrupt, it has been judicially determined and is *res judicata* as to all the world. The evidence also shows that an assignee was appointed; that he accepted the trust; that he gave bonds; and that the usual assignment was made to him of the property, real and personal, that the bankrupt possessed at the date of filing his petition, and that this identical land was included.

That this land passed by the assignment to the assignee is beyond question.

See Sec. 14, *Bankrupt Law.*
In re. John A. Mebane, 3 *B. R.*, 91.
In re. Wayne, 3 *B. R.*, 5.

The title to this property being in the assignee, what latent or reserved rights had the bankrupt in this land, that independent of and in opposition to the rights of the assignee he could under any circumstances convey. This property at the

date of the conveyance to Brown, was legally in possession of the assignee. Any interference therewith by the bankrupt was unwarranted by law, and was null and void. So far as this property was concerned, the bankrupt was *civiliter mortuus;* he could acquire no rights to it, because the assignee was the legal custodian and in legal possession. If then he had no rights that he could convey, he could pass none to Brown, and Brown acquired no title to this land or interest therein by virtue of his quit-claim deed from the bankrupt. This property was at that time in *custodia legis*, and the deed from the bankrupt was in fact in contempt of the Court's authority and void.

Hendon v. *Howard*, 9 *Wall*, 664.
International Bank v. *Sherman*, 101 *U. S.*, 403.

The defendants in error could not be *bona fide* purchasers of this land, even if they had no knowledge of the bankruptcy of Willey or the appointment of the assignee.

Every person is bound to take notice of the proceedings in our Courts, especially when they are in the same Judicial District as in this case. The filing of a petition, praying the adjudication in bankruptcy *is notice to all the world*, and all persons dealing with the person thus charged, do so at their peril. No person can, by dealing with a debtor thus situated, acquire any title to his property, as against the assignee in bankruptcy.

In re. Gregg, 3 *N. B. R.*, 131.
Ex parte Vogel, 2 *N. B. R.*, 138.
In re. Wayne, 4 *N. B. R.*, 5.

And it is undoubtedly well settled, that the assignment made under the bankrupt law is an assignment by operation of law, and the whole world is bound to take notice of it.

Mays v. *Manufacturer's National Bank*, 4 *B. R.*, 147.
Hitchcock v. *Sedwick*, 2 *Vernon*, 156.
In re. Lake, 6 *B. R.*, 542.
Miller v. *O'Brien*, 9 *B. R.*, 26.
Conner v. *Long*, 104 *U. S.*, 228.

The neglect of the assignee to file a copy of the assignment in the County where the land was situated within six months, did not divest the assignee of the title to the land.

Davis v. *Anderson*, 6 *N. B. R.*, 147.

If we are correct in our position, it follows that when the assignee presented his petition to the District Court for an order to sell what interest the bankrupt had in this real estate, the assignee was possessed of the legal title to the land, and this seems to have been conceded by the Supreme Court of Michigan.

Did the plaintiff acquire the legal title to this land by the conveyance from the assignee?

This appears to be the important question in the case, and it was decided against the plaintiff for the reason that the assignee did not give notice to the defendants of the application to the Court for an order to sell this land. The assignee only desired to dispose of what interest the bankrupt had in this land. The assignee could have disposed of that interest without an order of the Court.

In re. McClellan, 1 *B. R.*, 91.
Second National Bank v. *National Bank, Newark*, 11 *N. B. R.*, 49.

When no advantage can result to the estate of the bankrupt, why should the Court interfere?

In re. Iron Mountain Co., 4 *N. B. R.*, 645.

The general rule unquestionably is to permit a sale of any alleged interest in the land of the bankrupt. If he has no interest, then no title passes. The question of title is usually left to be determined in an action of ejectment.

Reeser v. *Johnson*, 10 *N. B. R.*, 467.

It seems there are several modes in which the assignee may deal with property encumbered with a lien, or in dispute. He may sell the property subject to the lien or claim, without any order of the Court for that purpose.

Kelley v. *Strange*, 3 *N. B. R.*, 2.

In such cases he transfers to the purchaser no better title than he had himself; the purchaser takes, subject to the encumberance or claim.

In re. McClellan, 1 *N. B. R.*, 398.

When the property is encumbered, it will be taken for granted, that the assignee sold subject to the encumberance.

Meek v. *Whately*, 10 *N. B. R.*, 498.

By the first section of the Bankrupt Act, the District Court has complete original jurisdiction of all the assets of the bankrupt, and has power to do all matters and things in virtue of the bankruptcy up to the final distribution of the estate.

Under this grant of power the Court has a right to pass any order or decree it thinks proper for the purpose of doing equity to all parties in interest, and to collect all the assets of the bankrupt, whether encumbered or not. It was the intention of Congress to confer on the Court power to dispose of encumbered property of the bankrupt in any manner it might in its discretion deem best for the interest of all concerned.

In re. Solomon, 2 *N. B. R.*, 19.

And this Court in the case of *Ray* v. *Norseworth*, 23 *Wall*, 128, says, that "Authority is doubtless possessed by the assignee to sell the property of the bankrupt, whether the same is or is not encumbered, but when he sells encumbered property without any special order from the Court, he sells the same subject to any and all lawful encumberances, and can convey no better or higher interest than the bankrupt could have done," and this Court further says, that in such cases it will be taken for granted, that the assignee sold only such right or title to the property as was vested in him as the representative of the bankrupt, and therefore he sold subject to the incumberancy.

Under these decisions the assignee would no doubt have authority to sell this property, and pass the legal title to the plaintiff, without any order of the Court for that purpose.

But the assignee in this case petitioned the Court for an order to dispose of this land. In his petition (Tr., p. 28) he did not ask to be allowed to sell the land free from incumberances, as he might have done under Sec. 5063, U. S. R. Statutes. If he had, he would have been required to give notice to all adverse claimants. The assignee set forth in his petition the different claims on this property, and asked that he might be permitted to sell whatever interest there was in the bankrupt's estate. This authority is expressly given him

in Sec. 5066, U. S. R. Statutes, where he is given authority "to sell the same, subject to such mortgage, lien, or other encumberances."

The assignee has also authority to dispose of this property by a supplemental Act passed June 22, 1874, Chapter 390, Sec. 4, which says, that "Unless otherwise ordered by the Court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels and at such times and places as shall be best calculated to produce the greatest amount with the least expense," and General Order No. 21, as amended, says, "that upon application of the assignee to the Court, and for good cause shown, the assignee may be authorized to sell any specific portion of the bankrupt's estate at private sale."

Vol. 6, *Abbot's National Digest*, 100.

It would seem from what has been said, that the assignee had full power to convey the legal title and did convey the same by the proceedings as disclosed in this record, and that the legal title to this land was at the time of the commencement of this suit in the plaintiff. We are not called upon to determine what the rights of the plaintiff would have been if the assignee had attempted to dispose of this property under Sec. 5,063, U. S. R. Statutes, because no such authority was asked for and no such proceedings were had.

Hence the decisions of the Court as to proceedings under that section of the Statute have no force in determining the rights of the parties in this controversy.

The case is simply this: The assignee being the legal owner of this property, and being in possession of it (the presumption of law being that possession follows the legal title, and this presumption remains until an ouster has been shown), he desired to dispose of the land, and for that purpose obtained the authority of the Court to sell it, and by virtue of that authority did sell the same to the plaintiff. How can it be said that the assignee did not part with the legal title to it, because it subsequently appeared that some other person claimed an interest in the property under a void conveyance, and he had no notice of the application to the Court by the assignee for an order to sell. It will be observed, that the assignee in his petition (Tr., p. 28) did not ask, and the Judge (Tr., p. 30) did not order the sale of the entire interest free from all claims, but

only of the interest that was vested in the assignee, and what right had an adverse claimant to be heard on the question of making such an order, or if he had notice would he be allowed to oppose it.

Under such an order the adverse claimant loses no rights that he had to the land before the order and the sale under it was made. What rights he had in the land remain the same, and there is no evidence in the record that if he had had notice, and attended the sale, and the sale had been public, he would have given any more for the assignee's title to the land than the plaintiff did, nor is there any evidence in the case that the interest that the assignee had in the land was worth any more than was given by the plaintiff in this case.

Suppose that the assignee in such cases as this was required to give notice of his application for an order to sell to all persons that might have an interest, however obtained, in the land he desired to sell. If he must give such notice, the want of such notice to any one claiming an interest, however small or remote, would avoid the sale.

The adoption of such a rule would put an end to the final settlement of a bankrupt's estate, because the title, whatever it might be, would remain in the assignee until it had passed out of him to some other person, and any interest even if unknown to the assignee, would vitiate the sale to the same extent as an interest that was notorious.

The assignee would be unable to say when notice was given; that such notice had been given to all persons that had or claimed to have an interest in the land.

If such was the law, any person so disposed could forever defeat the final disposal of the property belonging to an estate in bankruptcy, or if sold, it would be done at a great sacrifice and at a nominal sum, as there would always arise this question, whether the proper parties had been notified. The law does not countenance any such proceedings.

Whatever claim a party has to such property remains the same and must be governed by the same law after as before the sale.

To entitle a defendant to avail himself of any matter of defense, which formerly required to be pleaded specially under the laws of Michigan, the defendant can annex to his plea of the general issue a notice to the plaintiff, briefly stating the precise nature of such matter of defense.

Howell's St., Sec. 7363.

The defendants in this case have annexed to their plea a notice which they contend is equivalent to a plea of the Statute of Limitations. It would not be good as a special plea of the Statutes of Limitations, and nothing was claimed under the plea on the trial of this case in the Circuit Court, and was first raised on the hearing of this case in the Supreme Court of the State of Michigan, and should have been disregarded by that Court under its former decisions.

But if we consider it a good notice, and properly before the Court, it can not be applied to this case under the facts as appears in this record.

The presumption of law is that possession follows the legal title, and this presumption continues until an ouster is shown. The record does not show that any one is in the actual possession of this land, or that the assignee was ever ousted from the possession which he had by virtue of his legal title, nor was he in fact ever dispossessed. The assignee holding the legal title is presumed to be in possession, and such presumption is made by express statute of the State of Michigan. The section of the statute to which I refer is as follows:

"In every action for the recovery of real estate, or the possession thereof, the person establishing the legal title to the premises shall be presumed to have been possessed thereof, within the time limited by law, for bringing such action, unless it shall appear that the same have been possessed adversely to such legal title by the defendant or by those from or under whom he claims."

Howell's Statutes, Sec. 8701.

Under this section the time when the action accuses is when an adverse possession is taken. It has been so decided by the Supreme Court of the State of Michigan, as well as by this Court.

Banks v. *Ogden*, 2 *Wall*, 57.

The defendants claimed some interest in the land when this action was commenced, and by the laws of Michigan ejectment may be brought against them, whether they were in possession or not. This is expressly provided for under the following provisions of the Statute.

"Sec. 7791. If the premises for which the action is brought are actually occupied by any person, such actual occupant shall be named defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed or claiming title thereto or some interest therein at the commencement of the suit, and all persons claiming any title to the premises adverse to that claimed by the plaintiff, may in all cases be made defendants in such action."

Howell's Statutes, Sec. 7791.

As the Supreme Court did not pass upon this question of limitation, it may not be important in determining this controversy.

S. S. BURDETT,
H. H. HOYT,
Attorneys for Plaintiff in Error.